

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

No. 11,414

BRIEF AND APPENDIX FOR APPELLANTS

IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

United States Court of Appeals

For the

District of Columbia Circuit

JOAN C. SMITH, ET AL., *Appellants.*

v.

MORRIS POLLIN, ET AL., *Appellees.*

CLERK

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Appeal from the United States District Court
for the District of Columbia

and

Motion of Appellants to Recall Mandate in
Cases 10,996 and 11,198

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QUESTIONS PRESENTED

1. Whether the District Court abused its discretion in overruling the motion of appellants to vacate the judgment dismissing the complaint, as amended, (on the evidence in chief) which motion and supporting affidavit under Rule 60, F.R.C.P. made an uncontradicted showing of: (a) error of law apparent on the face of the record (i.e., the findings do not support the judgment of dismissal); (b) newly discovered material evidence of a character likely to change the result of a new trial and showing fraud committed at the trial by parties to the action; and (c) inadvertence of counsel for appellants at the trial on a material matter having a critical bearing on an important finding of fact that there was no evidence of a higher offer for the trust property?
2. Whether appellants were denied due process (a hearing) upon the motion to vacate the judgment of dismissal, which is a plenary proceeding under Rule 60, F. R. C. P., where the trial Judge refused a requested opportunity for oral presentation and an opportunity to present evidence in support of the verified motion?
3. Whether it was an abuse of discretion to overrule the motion without stating any reasons for that action or making findings?
4. Whether this Court should recall its mandate in cases No. 10,996 and 11,198, (where both previous appeals in this case were dismissed) because of the showing of error on the instant appeal and in order to correct a serious mistake in the dismissal of the first appeal?

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v.

MORRIS POLLIN, ET AL., *Appellees*.

Appeal from the United States District Court
for the District of Columbia

BRIEF AND APPENDIX FOR APPELLANTS

JURISDICTIONAL STATEMENT

This appeal is taken from a final order of the District Court overruling a timely verified motion of appellants under Rule 60, F. R. C. P. to vacate a final judgment of the District Court dismissing the complaint, as amended, on February 8, 1951. Jurisdiction to hear the appeal rests on U. S. Code, Title 28, Section 1291.

The order in question is a final appealable order either with or without an allegation of abuse of discretion. *Greenspahn v. Joseph A. Seagram & Sons*, (C. C. A. 2), 186 F. 2d 616; *Klapprott v. United States*, 335 U. S. 601, 69 S. Ct. 384; *Washington v. Sterling*, No. 1244, D. C. Mun. App., decided August 5, 1952; *Oliver v. City of*

Shattuck, ex rel. Versluis (C. C. A. 10), 157 F. 2d 150. The claim in the motion to vacate dealing with fraud committed against the trial Judge by parties to the action (newly discovered evidence) which had a material bearing in producing the result in favor of appellees at the trial is appealable without regard to Rule 60, F. R. C. P. *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U. S. 238, 248, 88 L. Ed. 1250, 64 S. Ct. 997; *Hadden v. Ramsey Products*, 96 F. Supp. 988. The allegations of the motion dealing with newly discovered material evidence and error of law apparent on the face of the record (formerly reviewable by bill of review, or bill in the nature of a bill of review, as to the equity count, and by writ of error coram nobis as to the law counts, now preserved in essence by Rule 60) are appealable questions. *Frazer v. Doing*, 76 U. S. App. D. C. 111, 130 F. 2d 617; *Rudolph v. Hunt*, 52 App. D. C. 343, 345; *Lavagnino v. Prall*, 52 App. D. C. 77, 80; *Ex Parte Thomas*, 73 App. D. C. 50, 114 F. 2d 847; *Parks v. Parks*, 68 App. D. C. 363, 98 F. 2d 235; *Brady v. Beams* (C. C. A. 10), 132 F. 2d 985, 986, cert. den. 319 U. S. 747, 87 L. Ed. 1727, 63 S. Ct. 1032, reh. den. 319 U. S. 784, 87 L. Ed. 1727, 63 S. Ct. 1315; *Irvin v. Buick Motor Co.*, (C. C. A. 8), 88 F. 2d 947, 949.

STATEMENT OF THE CASE

On December 19, 1950, the eleven (11) appellants to this true class action, ten (10) of whom are infants, filed an action in the District Court, being case No. 5504-50, against nineteen defendants for fraud and breach of trust in connection with the sale and conveyance of 82 acres of trust property in the Northeast section of the District of Columbia belonging to the trust created by the will of Louis Kolipinski, deceased. The entire will of Dr. Kolipinski appears verbatim in the decision of this Court in *Evans v. Ockershausen*, 69 App. D. C. 285,

100 F. 2d. 695, *cert. den.* 306 U. S. 633, 33 L. Ed. 1034, 59 S. Ct. 462. The plaintiffs in that action are remaindermen under the will. Under a supplemental agreement between the widow and four surviving children of the testator executed in 1942, the trust was modified to provide that upon the death of any child of the testator, his or her children would take *per stirpes* the share of the parent in the income of the trust until the expiration of the trust upon the death of the last child of the testator. The widow and one child of the testator have since died. The defendants to this fraud action are the trustees under the will of Dr. Kolipinski, the husband of a trustee, two attorneys for the trustees, two brokers who negotiated the sale, and the buyers of the trust property who paid \$573,000. cash for the property at the conveyance on July 14, 1950.

Shortly stated, the complaint alleged that the sale and conveyance of the trust property had been procured, induced and influenced by the improper payment of \$10,000. by the buyers and their agents to the two attorneys for the trustees and the husband of a trustee¹; that the method of the bribery was for the two brokers in a side agreement executed at the time of the contract of sale to pay the \$10,000. to the fiduciaries out of their real

¹ The complaint also alleged that the trust property had been sold by the trustees for \$67,158. less than the highest offer; for \$410,000. less than its fair market value at the time of sale; and that it was sold without authority of the District Court which had retained a continuing jurisdiction over the trustees and the estate of Dr. Kolipinski in Equity Cause 59,573. There was substantial evidence at the trial to support all those allegations.

The first count sought rescission; recovery from the brokers of all commissions received out of the trust estate and also what they received from the buyers because of their disloyalty in secretly representing both buyer and seller; and recovery from two attorneys for the trustees and the husband of the trustee of the improper \$10,000. payment out of the brokers' commission which they divided equally. The third and fourth law counts, as a precaution, sought recovery of the full damage.

estate commission of 5% which the trustees had agreed to pay on the sale (about \$28,671.), with an agreement on the part of the buyers before the contract of sale to reimburse the broker Mensh for that improper payment, and to pay to that broker an additional commission of one (1) per cent; and that when the buyers failed to perform after they got the deed to the trust property, they, in lieu of those payments, agreed to give that broker (Mensh) the exclusive sale of the first one hundred houses the buyers erected on the trust property. This substitute agreement was carried out by the buyers while an appeal was pending in this Court in case No. 10,996, and in the Supreme Court on certiorari, although the action has been a continuous *lis pendens* against the property since December 19, 1950.

After a three day trial in the District Court, Judge Holtzoff on the evidence in chief directed the jury to return a verdict for the defendants on the third and fourth law counts; the trial judge summarily dismissed the first count for rescission of the sale and conveyance; findings and conclusions were filed; and on February 8, 1951, a final judgment was entered dismissing the action. A timely appeal was prosecuted in this Court in case No. 10,996, which assigned fourteen substantial and extensive errors committed by the trial judge. When that appeal was called for oral argument in open court on May 31, 1951, this Court refused to allow the sole counsel for appellants to orally argue the appeal, and eight days later, on June 8, 1951, the Court filed a per curiam reading as follows (89 U. S. App. D. C., 190 F. 2d 657, cert. den. 342 U. S. 878, 72 S. Ct. 170, rehearing denied, 72 S. Ct. 298):

“Because appellants’ brief of some 110 pages grossly violates our Rule 17 (g) we limited oral argument. Nevertheless we have examined the entire record. We find that no injustice is done in dismissing the appeal. Dismissed.”

A petition for rehearing, for rehearing *en banc*, and for stay of the mandate pending certiorari was denied on July 11, 1951, and the mandate was ordered to issue "forthwith" which was performed by the Clerk of this Court on the same day. The District Court entered a judgment on the mandate on July 18, 1951. That judgment on the mandate recited the dismissal of the appeal, and ordered judgment against "Joan C. Smith, et al." for some \$322. costs of appellees on the appeal in case No. 10,996. An appeal from the judgment on the mandate was basically taken to prevent that judgment from becoming *res judicata*, or a technical problem in that respect from arising, while petition for certiorari was pending in the Supreme Court to review the dismissal in the main appeal in case No. 10,996. Thereafter, the Supreme Court denied certiorari on November 13, 1951, and a petition for rehearing, which set forth newly discovered and material evidence affecting the result of the trial, on January 2, 1952.

The appeal from the judgment on the mandate (Case No. 11,198) was dismissed on motion of appellees by a *per curiam* of March 13, 1952. Petition for rehearing was denied on June 13, 1952.

The instant appeal is from an order overruling the motion of appellants, supported by a detailed affidavit of David F. Smith, father, guardian ad litem and next friend of the ten infants appellants, to vacate the judgment of February 8, 1951, dismissing the complaint, as amended, which was filed under the authority of Rule 60, F. R. C. P., and also pursuant to the procedure outlined by this Court in a *per curiam* of April 29, 1952, in Case No. 11,198. That *per curiam* denied leave to file the identical motion under Rule 60, F. R. C. P. which is the subject of this appeal but, adapting the civil practice to the criminal, pointed out that the motion should be presented to the District Judge; and that if the District

Judge indicated he would grant the motion, this Court would remand the record for that purpose so as to reinvest the District Court with jurisdiction to act. The motion to vacate under Rule 60, F. R. C. P. was filed in accordance with that procedure. It was presented uncontradicted in any respect by any appellee to the trial Judge (Judge Holtzoff) with a statement that the motion, supported by the affidavit, was a plenary proceeding; that on the uncontradicted showing appellants were entitled to an order vacating the judgment of dismissal of the complaint, as amended; that if the trial Judge had any doubt in that respect, then appellants desired to take testimony in open court in support of the verified allegations of the motion; and that appellants desired to be heard on the motion. The trial Judge said he would read the motion and supporting affidavit. The next morning counsel for appellants received a memorandum simply stating "denied." (App. 27) before the order overruling the motion was signed exceptions were duly noted in all the respects urged as error here (App. 25, 26).

On May 19, 1952, this Court entered an order in the instant appeal directing that the entire record on the first appeal (No. 10,996) be treated as a part of the record on this appeal. Thus, the record on this appeal consists of the entire record at the trial and the record on the instant appeal. All testimony and proceedings at the trial are part of the record. The original findings and conclusions signed by the trial Judge are part of the record and will be helpful to this Court in understanding the findings, etc. actually made as it relates to one aspect of this appeal; i.e., error of law apparent on the face of the record in that the findings do not support the judgment of dismissal of the complaint, as amended.

The motion to vacate the judgment of dismissal and the detailed, factual affidavit supporting the motion are

not repeated here to avoid useless printing and repetition (App. 2-22). The motion was grounded on newly discovered evidence of a character likely to change the result upon a new trial which also showed without contradiction by any appellee (or counsel for the buyers and brokers at the trial) a serious fraud committed against the trial court at the trial by parties to the action which resulted materially in a judgment of dismissal in their favor; that the newly discovered evidence was first discovered after this Court had dismissed the first appeal and after petition for certiorari was pending; and that this newly discovered evidence was brought promptly to the attention of the Supreme Court by petition for rehearing, with a request to remand to this Court for its consideration, which that court denied on January 2, 1952. A second ground of the motion was a serious inadvertence of counsel for appellants at the trial in failing to bring out the criminal record of the witness Shapiro which had an important bearing on a critical finding of the trial court that there was "no evidence" that a higher offer (\$67,158.) had been made for the trust property five weeks before the trustees conveyed to the appellees Pollin and their family corporation, Riggs Park Land Co., Inc.; and the third ground of the motion was error of law apparent on the face of the record in that the findings actually made do not support the judgment of dismissal and show beyond doubt that appellants made out a prima facie case on the evidence in chief, which are matters of law which can be properly determined on the record without reference to the evidence at the trial; i. e. on the pleadings, pre-trial order, findings, conclusions, and judgment. Of course, that part of the motion dealing with newly discovered evidence necessitates recourse to the perjured evidence given at the trial by parties to the action, called as necessary hostile witnesses in the exigency of this fraud action, in order that this Court might weigh from the standpoint

of probable effect, the impact of the newly discovered evidence on a new trial. A summary of the argument is omitted because the main argument is very brief.

STATEMENT OF POINTS

The District Court committed manifest error and abused its discretion in the following particulars:

1. In overruling the motion of appellants under Rule 60, Federal Rules Civil Procedure, to vacate and for relief from the final judgment of February 8, 1951, which dismissed the complaint, as amended.

2. In failing to give any reasons for denying said motion and in failing to make special findings and conclusions on the uncontradicted showing made by said motion and supporting affidavit.

3. In the summary disposition of the motion which was a plenary proceeding under Rule 60, Federal Rules Civil Procedure, or the equivalent of a separate and independent action.

4. In refusing an opportunity for oral presentation and argument on the motion and in refusing to allow evidence to be taken in support of the motion, as requested, in violation of the due process clause of the Fifth Amendment to the Federal Constitution and U. S. Code, Title 28, section 1654, relating to the right to be heard in Federal Courts in person or by counsel.

5. In failing to vacate the judgment of dismissal of February 8, 1951, on the uncontradicted showing made by the motion and supporting affidavit under Rule 60, Federal Rules Civil Procedure.

6. In failing to vacate the judgment of dismissal of February 8, 1951, because of error of law apparent on the face of the record, and because the uncontradicted

showing of newly discovered material evidence was of a character which would probably reverse the result on a new trial.

7. The allegations of the motion and supporting affidavit as they relate to fraud committed against the trial Judge during the trial by parties to the action are so far outside the usual run of cases that the District Court abused its discretion in failing of its own motion to order an inquiry into the allegations and to afford an opportunity to prove those allegations, even if doubt appeared on the face of the uncontradicted showing.

8. All the foregoing points of error are repeated without the allegation of abuse of discretion.

ARGUMENT

As proceedings under Rule 60, F. R. C. P. to vacate a judgment are comparatively rare, it would seem to be helpful as a prelude to argument to set forth the authority with respect to the scope of review open on those proceedings as well as the plenary character of the proceeding.

Rule 60, F. R. C. P., as amended, in so far as pertinent, provides as follows:

“Rule 60, Relief From Judgment or Order:

(b) Mistake; Inadvertence, Excusable neglect; Newly discovered evidence; Fraud, etc. On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) Mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59b; (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct

of an adverse party; . . . or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to grant relief to a defendant not actually personally notified as provided in Title 28, USC, par. 1655, or to set aside a judgment for fraud upon the court. Writs of coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of a bill of review are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by independent action."

In *Fraser v. Doing*, 76 U. S. App. D. C. 111, 114, 130 F. 2d 617, this Court in discussing the former remedy of bill of review for error of law apparent on the face of the record, then superseded by the Federal Rules of Civil Procedure, said:

"The Supreme Court has stated that: 'Bills of review are on two grounds: first, error of law apparent on the face of the record without further examination of matters of fact; second, new facts discovered since the decree, which should materially affect the decree and probably induce a different result.' *Scotten v. Littlefield*, 235 U. S. 407, 411, 35 S. Ct. 125, 59 L. Ed. 289.

A third ground, also, has been recognized, namely, fraud in procuring the decree. *Irwin v. Buick Motor Co.*, 8 Cir. 88 F. 2d 947, 949, cert. den. 301 U. S. 702, 57 S. Ct. 932, 81 L. Ed. 1357. See *Simonds v. Norwich Union Indemnity Co.*, 8 Cir., 73 F. 2d. 412, 415, cert. den. 294 U. S. 711, 55 S. Ct. 507, 79 L. Ed. 1246. (Quotation omitted). * * *

Assuming that this issue was properly presented by appellant's complaint, it then became the duty of

the court to consider it, upon the whole record in Equity Cause No. 67,317, as a question of law arising upon the pleadings, the proceedings and the decree in that case. *Continental Oil Co. v. Osage Oil and Refining Co.*, 10 Cir. 69 F. 2d. 19, 24; *Rudolph v. Hunt*, 52 App. D. C. 343, 286 F. 1007, cert. den. 262 U. S. 744, 43 S. Ct. 521, 67 L. Ed. 1211."

In *Rudolph v. Hunt*, 52 App. D. C. 343, 345, the Court said:

"A bill of review, except when based upon newly discovered evidence, can only proceed upon error of law apparent on the face of the record, not upon error of fact or an alleged mistaken view which the court may have taken of the evidence. 'On a bill of review the proofs cannot be considered.' *Putnam v. Day*, 22 Wall. 60, 22 L. Ed. 764. Or, as said in *Shelton v. Van Kleeck*, 106 U. S. 534, 1 S. Ct. 491, 27 L. Ed. 269:

"The only questions open for examination on a bill of review for error of law on the face of the record are such as arise on the pleadings, proceedings, and decree, without reference to the evidence in the cause' "

In *Irvin v. Buick Motor Co.* (C. C. A. 8), 88 F. 2d, 947, 949, it is said:

"Ordinarily, there are but three grounds for which a bill of review is grantable. These are (a) an error in the decree, apparent on the face thereof; (b) newly discovered competent and relevant evidence, that could not with due diligence have been earlier discovered, and which when added to the evidence already adduced should probably modify the decree and produce a different result. (*Hill v. Phelps*, 101 F. 650; *Acord v. Pocahontas Corp.*, 174 F. 1019); and rarely (c) for fraud in procuring the decree including fraudulently procured evidence and perjury, which were controlling in procuring the decree sought to be set aside (*Arms v. Kimberly*, 136 U. S. 629, 10 S. Ct. 1064, 34 L. Ed. 557). And in the latter

situation it has been said that a bill in the nature of a bill of review might be resorted to. *Dowagiac Mfg. Co. v. McSherry Mfg. Co.*, 155 F. 524.

It is not all apparent errors which may be the subject-matter of a bill of review, but only such as are wrong on the pleadings, record and decree, excluding the evidence. The decision of a court on issues of fact, in so far as they are bottomed on the evidence adduced, is conclusive on a bill of review (*Whiting v. Bank of United States*, 13 Pet. 6, 10 L. Ed. 33; *Nickle v. Stuart*, 111 U. S. 776, 4 S. Ct. 700, 28 L. Ed. 599), and so if the decree were merely erroneous, when the law is applied to the evidence, recourse must be had for correction to an appeal."

In *Parks v. Parks*, 68 App. D. C. 363, 364, 98 F. 2d. 235, this court said:

"In order that error may be said to be apparent on the face of the record it must appear that the court erred in point of law, 'Taking all the circumstances to be as they are set out in the pleadings * * *.' *Clark v. Killian*, 103 U. S. 766, at page 769, 26 L. Ed. 607. This has been otherwise expressed by saying that the decree 'in point of law, is erroneous upon the state of facts assumed * * *' (*Eaton v. Dickinson*, 35 Tenn. 397, 3 Sneed 397, 400; *Burson v. Dosser*, 48 Tenn. 754, 1 Heisk. 754, 759); that 'only question of law which arise on the pleadings, proceedings, and decree may be considered' (*Continental Oil Co. v. Osage Oil and Refining Co.*, 10 Cir. 69 F. 2d, 19, 24, cert. den. 287 U. S. 616, 53 S. Ct. 24, 77 L. Ed. 535); and again such error has been described in the laconic manner of Learned Hand, J., as 'a misconception of what the rule is which will eventually be enforced by the court having the final word.'" In *re Brown*, D. C. S. D. N. Y. 213 F. 701, 702, affirmed 2 Cir. 213 F. 705, affirmed, 235 U. S. 407, 35 S. Ct. 125, 59 L. Ed. 289 (footnote)."

The findings of fact, statements of the court in settling those findings, and the opinion of the court are part of the "record" for review on error of law apparent on the

face of the record. *McDougald v. Dougherty*, 39 Ala. 409; *Shepard v. Chapman*, Va., 21 S. E. 468; *Regner v. Hoover*, 318 Ill. 169, 149 N. E. 16; *Vyverberg v. Vyverberg*, 310 Ill. 599, 142 N. E. 191; *Stowe v. Rison*, 152 Va. 842, 148 S. E. 687; *Thompson v. Parsley*, 100 W. Va. 635; 21 C. J. p. 750, note 96.

In *Hazel-Atlas Co. v. Hartford-Empire Co.*, 322 U. S. 238, 248, 88 L. Ed. 1250, 64 S. Ct. 997, where the Court set aside a judgment based on a reversal in the Court of Appeals many years before for fraud of a party and their attorneys in presenting false documentary evidence on which the Court of Appeals relied in its opinion reversing, the Court said:

“Equitable relief against fraudulent judgments is not of statutory creation. It is a judicially devised remedy fashioned to relieve hardships which, from time to time, arise from a hard and fast adherence to another court-made rule that judgments should not be disturbed after the term of their entry has expired. Created to avert the evils of archaic rigidity, this equitable procedure has always been characterized by flexibility which enables it to meet new situations which demand equitable intervention, and to accord all the relief necessary to correct particular injustices involved in these situations. It was this flexibility which enabled courts to meet the problem raised when leave to file a bill of review was sought in a court of original jurisdiction for the purpose of impeaching a judgment which had been acted upon by an appellate court. Such a judgment, it was said, was not subject to impeachment in such a proceeding because a trial court lacks the power to deviate from the mandate of an appellate court. The solution evolved by the courts is a procedure whereby permission is sought in the appellate court. The hearing conducted by the appellate court on the petition which may be filed many years after the entry of the challenged judgment, is not just a ceremonial gesture.”

In the same case (Hazel-Atlas) see also dissent of Justice Roberts for four members of the court: (p. 259 U. S.)

“Since Lord Bacon’s day a decree in equity may be reversed for an error of law (citing cases), for new matter subsequently occurring, or after-discovered evidence. And this head of equity jurisdiction has been exercised by the federal courts from the foundation of the nation. (Citing cases). Such a bill is an original bill in the nature of a bill of review. Equity, also, exercises a like jurisdiction to prevent unconscionable retention or enforcement of a judgment at law procured by fraud, or mistake unmingled with negligence attributable to the losing party or rendered because he was precluded from making a defense which he had. Such a bill may be filed in the federal court which rendered the judgment or in a federal court other than the court federal or state, which rendered it (citing cases).”

See also *Universal Oil Products v. Root Refining Co.*, 328 U. S. 575, at 580, 90 L. Ed. 1447, 66 S. Ct. 1176, where the court said:

“The inherent power of a federal court to investigate whether a judgment was obtained by fraud is beyond question. The power to unearth such a fraud is the power to unearth it effectively.”

See also *Hadden v. Ramsey Products*, 96 F. Supp. 988, where a judgment was set aside because of fraud on the part of attorneys for a plaintiff in maintaining their silence toward the court with respect to a known defense of the defendant in taking a judgment by default.

With respect to the scope of the remedy generally under Rule 60, F. R. C. P. see: *Klapprott v. United States*, 335 U. S. 601, 69 S. Ct. 384; *Oliver v. City of Shattuck, ex rel. Versluis* (C. C. A. 10), 157 F. 2d. 150, 152, 153; *Kwasizur v. Cardillo* (C. C. A. 3), 175 F. 2d. 235, cert. den. 338 U. S. 880, 70 S. Ct. 150; *Greenspahn v*

Joseph A. Seagram and Sons (C. C. A. 2) 186 F. 2d. 616; *Fiske v. Buder* (C. C. A. 8), 125 F. 2d. 841. See also *Tozer v. Chas. A. Krause Mill Co.*, 189 F. 2d. 242, holding that Rule 60, F. R. C. P. must be given a liberal construction to effectuate its purpose.

Points of Error 2, 3 and 4

These points, without repeating them verbatim, deal with error amounting to an abuse of discretion in the summary disposition of this plenary proceeding under Rule 60, F. R. C. P., without an opportunity for hearing, without reasons or special findings, to support the action in denying the motion, without affording an opportunity to support the motion, as verified, with testimony as specifically requested (App. 22-25); and the action of the court in ignoring the uncontradicted showing made by the motion and supporting affidavit without any suggestion that the facts set forth were insufficient to state a case for relief.

First, it is obvious from a consideration of the cases cited above which arose under Rule 60, F. R. C. P. that proceedings under that Rule are plenary in character, especially where the rule preserves in substance and essence the ancient remedies of newly discovered evidence, fraud in procuring the judgment of dismissal, and error of law apparent on the face of the record. Appellants in open court and in the motion itself called attention to the plenary character of the motion and requested a full hearing and opportunity to present evidence in event the trial court entertained any doubt about appellants' right to an order on the uncontradicted showing made by the motion and affidavit, which was the equivalent of an independent action to impeach the judgment of dismissal of February 8, 1951, on the evidence in chief. Appellants got no hearing; there are no reasons assigned for the action in denying the motion and, of

course, there are no special findings or conclusions, which would seem to be required in all plenary proceedings to the end that this court might know the basis for the decision below. See Rule 52 (a) F. R. C. P., which properly read, would seem to require findings, etc. on *motions* embodying a plenary action, although the wording is inept. Cf. *Boss v. Hardee*, 68 App. D. C. 75, 93 F. 2d. 234.

The instant motion was not disposed of as a question of law. Cf. *King v. Wall & Beaver Street Corp.*, 79 U. S. App. D. C. 234, 238, 145 F. 2d. 377; *International Standard Electric Corp. v. Kingsland*, 83 U. S. App. D. C. 355, 357, 169 F. 2d. 890; *Filson v. Fountain*, 84 U. S. App. D. C. 46, 48, 171 F. 2d. 999; reversed on other grounds, 336 U. S. 681, 89 S. Ct. 754, 93 L. Ed. 971; *Simpson Bros. v. District of Columbia*, 85 U. S. App. D. C. 275, 279, 179 F. 2d. 430, cert. den. 338 U. S. 911, 70 S. Ct. 350, 94 L. Ed. 581. That part of the motion making an uncontradicted showing of newly discovered evidence nevertheless required the trial Judge to draw an inference of fact; i. e. whether that new evidence would probably change the result on a new trial, which could only be resolved on a finding. The same thing may be said of that part of the motion dealing with inadvertence; i. e. whether that inadvertence had a material bearing in settling findings of fact No. 16 at the trial. See, Moore's Federal Practice, 2d. Ed., par. 52.08, p. 2673: "The 1946 amendment (to Rule 52) should be read in conjunction and harmonized with the earlier provision requiring findings in all actions "tried upon the facts"; and the reasons for findings of fact are equally pertinent to this proceeding."

But, as the verified motion stands uncontroverted and the allegations are so striking and basic, this Court might well treat the uncontradicted showing as obviating the necessity for findings in the circumstances of this case. Of course, that part of the motion dealing with error of law apparent on the face of the record presents a pure

law question which this Court can decide just as well as the one below. From all that the trial Judge made known in simply denying the motion, he may have been laboring under the erroneous notion that he could not or would not touch a judgment which had come under the scrutiny of this Court. Such a view would have been wrong under the grounds of the motion even if this Court had affirmed the first appeal in this case rather than dismissing the appeal, not because it was frivolous, but because of the mere length of appellant's brief of 110 pages covering fourteen substantial points of error. *Southard v. Russell*, 57 U. S. 547, 16 How. 547, 14 L. Ed. 1052; *Eclipse Mach. Co. v. Harley-Davidson Motor Co.*, 286 F. 68, cert. den. 262 U. S. 743, 67 L. Ed. 1210, 43 S. Ct. 520; *Municipal Signal Co. v. Gamewell Fire-Alarm Co.*, 77 F. 452; *Guaranty Trust Co. of N. Y. v. Minneapolis and St. L. R. Co.*, 98 F. 2d. 345; *Hagerott v. Adams*, 61 F. 2d. 35, cert. den. 288 U. S. 599, 77 L. Ed. 975, 53 S. Ct. 317.

The refusal of a hearing on the motion, as requested, (App. 22-27) cannot be justified under the due process clause of the Fifth Amendment (*Powell v. Alabama*, 287 U. S. 309, at 326, 59 L. Ed. 960, 35 S. Ct. 582), or the statute (28 U.S.C.A. sec. 1654) according the right to a hearing in person or by counsel in all federal courts. This denial of a hearing is a matter of considerable importance. It is all the more emphasized because of the refusal of this Court to accord a hearing to appellants on the two previous appeals in this case, which seems to be an unprecedented action in view of the fact that ten infants are appellants. This Court itself has stated repeatedly that the court itself owes a duty to infants involved in litigation. Nevertheless, without waiving these points in the least, appellants would prefer a decision on the merits to the end that this case may be retried and reach an early termination.

Points 1, 5, 6 and 7

These points relate to an abuse of discretion in denying the motion, in failing to enter an order vacating the judgment of dismissal of the complaint, as amended, upon the uncontroverted showing made by the motion and supporting affidavit; and in failing to set aside the order of dismissal for newly discovered evidence, inadvertence of counsel, and for error of law apparent on the face of the record.

The appellees in this action are some of the most astute and experienced attorneys, brokers, and builders to be found anywhere. They deliberately chose not to make any answer to the sworn allegations in the supporting affidavit to the motion. The motion as verified was tantamount to a bill of complaint or independent action to impeach the judgment. What is even more distressing, the attorneys for the brokers and buyers, with two exceptions, were charged with knowledge of perjury committed at the trial by the brokers Mensh and Plunkert and with maintaining their silence when Mensh and Plunkert were called as hostile witnesses in the necessities of this fraud case, as is generally true with respect of proof of fraud. See, *Bradley v. Davidson*, 47 App. D. C. 266, at 284. Yet, they too made no response, although the same counsel, then and now, are representing the appellees.

We think the uncontradicted showing made by the verified motion required the trial Judge to vacate the judgment of dismissal. See, *Hadden v. Ramsey Products*, 96 F. Supp. 988, 991, and cases there cited; and *Perkins v. Tyrer*, 24 App. D. C. 447, 456, where this Court said:

"It has been held in numerous cases that, if the allegations of a bill of complaint are distinct and positive, they may be taken as true without proof, if the defendant makes no defense; * * * *Ohio C. R. Co. v. Central Trust Co.*, 133 U. S. 83, 33 L. Ed. 561, 10

S. Ct. 235; *Thompson v. Wooster*, 114 U. S. 104, 29 L. Ed. 105, 5 S. Ct. 788."

The error of law apparent on the face of the record arises from the fact that the findings, as stated by the trial Judge, do not support the conclusion and judgment dismissing the complaint. The critical findings, which are unaffected by any other findings, are as follows:

Finding No. 9 (App. 40) states in part:

"Thereupon, and simultaneously with the execution of said sales contract, the defendants Mensh and Plunkert, * * * executed a written agreement to pay out of their sales' commission the fees of said trustees' attorneys aggregating \$10,000."

Finding No. 13 (App. 41), states in part:

"Out of the proceeds of sale and pursuant to written instructions given to the Title Company by the brokers, the defendant Title Company paid to the defendants Doyle, Burke and Bucy the aggregate sum of \$10,000, which sum was charged against the real estate commission of the defendants Mensh and Plunkert."

One of the pivotal issues at the trial was whether the brokers Mensh and Plunkert acted as agents for the trustees or the buyers on the sale and conveyance. See pre-trial order (App. 35) which recites the following issue at the trial:

"All of the defendants aver that defendants Mensh and Plunkert were agents of the trustees and not of any of the purchasers."

After the trial Judge had disposed of the entire case, both equity count one and law counts three and four, on the evidence in chief, all appellees submitted to the trial Judge a proposed finding of fact No. 9.

In that proposed finding the appellee sought to have the court find as a fact that the brokers Mensh and Plunkert acted "as their agents" (that is, as agents of the

trustees on the sale), which the court refused to do. (App. 45, 46). See also paragraph 9 of the original findings in the record. What transpired in settling that finding and the views of the court as to whom the agents actually represented on the sale are reflected in the following proceedings on settlement of the findings (App. 45, 46):

The Court: * * * And I must say that to me they (Mensh and Plunkert) were acting more as agents for the Pollins than for the Kolipinski estate, because they first obtained an offer from the Pollins and then came to the Kolipinski trustees and asked for that offer to be accepted * * * I am going to strike out the words (from proposed finding No. 9) "who were authorized in writing by the Kolipinski trustees as their agents to offer the Kolipinski tract for sale." Mr. Ottenberg: Just striking out the words "as their agents."

The Court: I will leave the sentence this way: "The aforesaid contract of sale was procured by the defendants Sidney Z. Mensh and Charles M. Plunkert, licensed real estate brokers in the District of Columbia, to whom for their services said trustees agreed in the written contract of sale to pay a real estate brokers' commission amounting to 5 per cent of the sale's price."

Therefore, what the trial Judge actually found, as shown by the findings on their face, is that the brokers Mensh and Plunkert acted as *agents for the buyers* on the sale and conveyance. Such is its inevitable result because there were only two sides to the transaction; i.e. the trustees, as sellers, and the appellees Pollin and their nominee, Riggs Park Land Co., Inc., as buyers, and if the brokers were not agents of the sellers, then they necessarily were agents of the buyers. The result would not be different if the brokers deceitfully represented both sides.

Consequently, taking all the foregoing findings together, the trial Judge has actually found that in connection with the sale of the trust property the agents of the buyers

(Mensh and Plunkert) paid the sum of \$10,000. to two attorneys for the trustees (who are fiduciaries) and to the husband of the trustee Bucy, who is an attorney in the Department of Agriculture. In the haste and impetuosity displayed by the trial Judge in settling the findings and conclusions, he undoubtedly did not realize the ineptness reflected in the result of the findings as a whole. These findings show on their face unlawful conduct on the part of the trustees, two attorneys for the trustees, the husband of a trustee, the two brokers, the Title Company, which acted as agents for the buyers, and the buyers themselves, which did not support the conclusion of the court that appellants were not entitled to relief, nor the judgment dismissing the complaint on the evidence in chief. The unlawful character of those transactions, as shown on the face of the findings, is made clear by reference to the following points:

First, the court found that two attorneys for the trustees and the husband of a trustee, received \$10,000. out of the real estate commission of the brokers Mensh and Plunkert. This disclosed a violation of D. C. Code (1940), 45-1414, 1416, a criminal statute entitled the "Real Estate and Business Brokers' License Act." Section 1414 of that Act (third paragraph), provides:

"It shall be unlawful for any person, firm * * * knowingly to pay a fee, commission or compensation to anyone for the performance within the District of Columbia of any service or act defined in this chapter as the act of a real-estate broker, real estate salesman, business-chance broker, or business-chance salesman, who was not duly licensed as such at the time such service or act was performed: * * *"

See also the criminal penalties provided by section 1416 of that Act. The complaint alleged that the brokers were licensed and that the attorneys for the trustees and the husband of the trustee were unlicensed persons under that Act; and the answers admitted those allegations.

See also section 1402 of that Act which subjects to the authority of that Act "any person * * * who, for another and for a fee, commission, or other valuable consideration, or who, with the intention or in the expectation * * * of receiving or collecting a fee, commission, or other valuable consideration, lists for sale, sells, exchanges, purchases, rents or leases or offers or attempts or agrees to negotiate a sale, exchange, purchase * * * of an estate or interest in real estate * * *". Section 1402 defined the persons subject to the foregoing license statute in such broad terms that, without an exception, it would prohibit an attorney at law from collecting a fee for orthodox legal services rendered to a client in connection with a real estate transaction unless he obtained a license. Hence, section 1402 provided an exception, among others, that the Act should not apply to "attorneys at law in the *ordinary* practice of their professions;" (Emphasis supplied). Sections 1414 and 1416 of that Act struck at this ancient form of bribery and alienation of loyalties by prohibiting a licensed broker from paying any fee, commission or compensation to any unlicensed person. The exemption in section 1402 with respect to attorneys at law in the "*ordinary*" practice of their profession refers, of course, to fees earned for services rendered to a *client*. Nothing in the Act even hints that attorneys, not to say anything about attorneys for fiduciaries, may lawfully "shakedown" licensed brokers, who are not clients of the attorneys, for any part of a real estate commission contracted to be paid by trustees on the sale of a trust property. Any other construction would stultify the wholesome purpose back of the Act, and open the door to endless mischief and breach of trust.

The Real Estate and Business Brokers Act was construed in *Eberman v. Massachusetts Bonding Co.*, D. C. Mun. App., 41 A. 2d. 844, and *Metzler v. Edwards*, D. C. Mun. App., 53 A. 2d. 42, 44, as being an exercise of

police power to prevent "fraudulent and dishonest practices" in the real estate business; and that contracts made in violation of that statute "are not merely unenforceable but void."

Therefore, the quoted findings of the court show on their face a violation of a criminal statute by the attorneys for the trustees, the husband of the trustee, and the brokers Mensh and Plunkert. Criminal conduct cannot be innocuous in a civil case. These findings did not warrant dismissal of the complaint against those defendants on the evidence in chief. But, on the finding of the trial Judge that the brokers were *agents of the buyers*, the matter assumes a larger and more significant aspect; and the findings on their face involve all the appellees, including the buyers of the trust property.²

² As the trustees contracted to pay the brokers commission (\$28,671.), Exbt. 2, there was no occasion in an honest transaction for the attorneys for the trustees and the husband of the trustee to "shakedown" the brokers. They could have collected any compensation properly due for legal services by simply billing the trustee as in the usual practice. This side deal between the fiduciaries and brokers, not reflected in the contract of sale, was highly suspicious and shows on its face conduct unlawful in many points. The attorneys for the trustees had been receiving an annual retainer out of the trust estate for fifteen years. The services they rendered were negligible. They rendered no appreciable services on the sale. The 82 acres of trust property was the last large tract of land left in the District of Columbia. It practically sold itself and the only question was in obtaining the highest price possible. The vice of fiduciaries obtaining a pecuniary stake in the performance of a particular trust sale is obvious. It appeared in concrete form here because five weeks before the trustees conveyed and after the fiduciaries had acquired their \$10,000. stake in the performance of the Pollin contract, as it afterwards appeared, the trustees, through their attorneys, and the husband of the trustee who got one third of the \$10,000., were informed that J. B. Shapiro, a large scale local builder had offered \$67,158. net more than the price at which the trustee sold to appellees Pollin, payable all cash or part cash as the trustees preferred. Yet, the fiduciaries refused to meet Shapiro to receive this higher offer which it was their plain duty to receive and to report to the court for instructions. Here, this Court will

Second, the findings quoted above in their entirety show that the *agents* of the buyers unlawfully paid \$10,000. to the attorneys for the trustees and to the husband of the trustee Bucy in connection with the sale. This is but a finding of mere bribery of the fiduciaries by the buyers of the trust property, who were charged with the same knowledge and with the same conduct their agents participated in (*Heilig Bros. Co. v. Kohler*, 366 Pa. 72, 76 A. 2d. 613). That it was an improper payment, whose influence no court would undertake to weigh, admits of no doubt. It violated everything ever written in the law of trusts that a fiduciary can have no profit out of his trust; that a fiduciary can assume no inconsistent position which has any conceivable "tendency" to place him in an antagonistic position as against his beneficiaries; and that fiduciaries are bound to maintain a "single eye" on the best interests of the beneficiaries and to maintain a "free" position to protect those interest by abstaining from any form of personal interest or stake in the performance of a trust transaction. These findings on their face show that there was no conceivable justification for dismissing the complaint on the evidence in chief.³ Under the ordi-

readily perceive the large injury to beneficiaries under a trust when fiduciaries serve their own interests by acquiring a personal financial interest in the performance of a particular contract of sale without regard to a higher offer. None of these evidentiary matters need be considered, because the findings on their face show the error of law apparent.

³ See original exhibits as follows: No. 2, contract of sale dated April 21, 1950; No. 7, side agreement between brokers and two attorneys for trustees signed concurrently with contract of sale; No. 8, letter of instructions to appellee title company from attorneys for trustees re recording of deed and payment of \$10,000. out of real estate commission; No. 9, side agreement of July 14, 1950, between brokers and two attorneys for trustees and the husband of the trustee re payment of \$10,000. out of the real estate commission; No. 10 purchaser's settlement sheet on sale; No. 10a, sellers' settlement sheet on sale; and App. 50 showing that the buyers were personally informed of the \$10,000. to the fiduciaries by their

nary rule applied in fiduciary cases, the burden is cast upon the fiduciaries to go forward with the evidence when there is any substantial evidence showing a breach of trust and fraud. Here the findings supplant the evidence, which need not be considered, and show on their face facts establishing, in inevitable result, a breach of trust and fraud. In *Re Honig*, Supreme Court New Jersey, June 16, 1952, 89 A. 2d. 411, 413, the court recently said:

"All fiduciaries are held to a duty of fairness, good faith and fidelity, but an attorney is held to an even higher degree of responsibility in these matters than is required of all others. 536 Broad St. Corp. v. Valco Mfg. Co., Inc., 135 N. J. Eq. 361, 38 A. 2d. 903, affirmed o.b. 138 N. J. Eq. 431, 48 A. 2d. 191. See also *Dunn v. Dunn*, 42 N. J. Eq. 431, 7 A. 842; *Crocheron v. Savage*, 75 N. J. Eq. 589, 73 A. 33; *Presbyterian Church of Flemington v. Plainfield Trust Co.*, 139 N. J. Eq. 501, 52 A. 2d. 400; 7 CJS, attorney and client, par. 127, p. 994; 5 Am. Jur. 287, attorneys at law, secs. 48 and 49."

In *Meinhard v. Salmon*, 249 N. Y. 458, 464, 164 N. E. 545, 62 ALR 1, Chief Judge (later Mr. Justice) Cardozo, said:

"Many forms of conduct permissible in a workaday world for those acting at arm's length, are forbidden to those bound by fiduciary ties. A trustee is held to something stricter than the morals of the market place. Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior. As to this there has developed a tradition that is unbending and inveterate. Uncompromising rigidity has been the attitude of courts of equity when petitioned to undermine the rule of undivided loyalty by the 'disintegrating erosion' of particular excep-

agents, the the brokers, the same day the contract of sale was executed. It is unnecessary to have recourse to this evidence because the error of law apparent appears on the findings and judgment alone. The evidence is cited to show that the findings have a sound basis on the uncontradicted evidence.

tions. * * * Only thus has the level of conduct of fiduciaries been kept at a level higher than that trodden by the crowd."

With respect to the strict and high standard of duty imposed in all jurisdictions upon fiduciaries see: *Slay v. Burnett Trust*, 143 Tex. Civ. 621, 639, 640, 187 S. W. 2d. 377; *Parsons v. Wysor*, 180 Va. 84, 21 S. E. 2d. 753; *Gragg v. Pruitt*, 179 Okl. 369, 65 P. 2d. 994; *Jackson v. Smith*, 254 U. S. 586, 65 L. Ed. 418, 41 S. Ct. 200; *Crites v. Prudential Insurance Co.*, 322 U. S. 408, 88 L. Ed. 1356, 64 S. Ct. 1075; *Fleishhacker v. Blum*, 109 F. 2d. 542; *Magruder v. Drury*, 235 U. S. 106, 59 L. Ed. 151, 35 S. Ct. 77; Scott, Law of Trusts, Vol. 2, pp. 856-857, sec. 170; pp. 909-910, sec. 170.25.

Appellants were also entitled on the findings as they stand to recover from both brokers everything they received out of the trust estate and also everything of value they received from the buyers growing out of the sale because of their fraud and disloyalty in secretly representing both buyers and sellers and participation in the bribery. *Wechler v. Bowman*, 285 N. Y. 284, 34 N. E. 2d. 322, 134 ALR 1337, and cases there cited. See also *Bradley v. Davidson*, 47 App. D. C. 266, 280:

"Said this court in *Mannix v. Hildreth*, 2 App. D. C. 259: 'Any attempt to occupy the relation of agent to two persons whose interests conflict, whether with or without notice to them, is to be condemned as contrary to good morals and the principles of equity.' In *Rawlings v. Collins*, 36 App. D. C. 72, 77, this court, speaking through Mr. Justice Van Orsdel, said that "the principal will be protected against any concealed, undisclosed action on the part of the agent, whereby the agent or anyone whom he secretly represents may secure an unfair advantage or occupy a position where a possible fraud might be perpetrated. * * * This is especially true where the agent and the purchaser are either the same person or acting in collusion.' Again, in *Fox v. Patterson*, 43 App. D. C.

484, 493, this court said: 'Instead, therefore, of Mr. Fox being in a position to act solely in the interest of Mrs. Patterson, he had secretly assumed a position antagonistic to her. Such conduct cannot be too strongly condemned, and where it has occurred the principal may repudiate the entire transaction and enforce reparation for losses sustained.'

While the findings on their face show all that is necessary to establish error of law apparent on the face of the record in dismissing the complaint as to the brokers, a reference to the evidence shows there was no mistake when the court refused to find as requested by appellees that the brokers were agents of the trustees and made a finding, negative in form, that the brokers were agents of the buyers on the sale.*

* The fraud and duplicity of both brokers (Mensh and Plunkert) is demonstrated by their own testimony in the record and by the documentary evidence without contradiction. Both brokers obtained "listing cards" from the attorneys for the trustees authorizing them to sell the 82 acres of trust land. (Exbts. 16, 31). In the preceding month Mensh had secretly obtained for the buyers a commitment for a loan on the trust property of \$400,000., plus a commitment for loans of more than \$6,500,000., for 750 houses to be erected on the trust property. (Tr. 77-78; 80-92, 109, Exbts. 13, 14, 15, 15a, 18, 19, 20). Mensh never advised the trustees or their attorneys that he knew the buyers were willing to pay \$600,000 for the property and he offered only \$7,000. per acre (or \$573,000.) which was the sale price (Exbt. 10; Tr. 77-78; 80-92; 109). Mensh also withheld from the trustees the fact that he had previously sold fifty new houses as agent for the buyers (Tr. 114). Before the contract of sale was executed he made an agreement with the buyers (Pollins) to reimburse him for the \$10,000. to be paid out of the real estate commission to the attorneys for the trustees and to pay him an additional commission of one per cent. of the sale price (Tr. 268-269; 103-108). The conduct of the broker Plunkert was equally vicious. Several months before the contract of sale in this case, Plunkert was the broker in the sale of five acres of land adjoining the trust property to the buyers (Pollins) for \$10,000. per acre, which was \$3,000. per acre more than the price on the instant sale (Tr. 348-350; 267-268). Plunkert admitted he concealed that vital information as to value from the trustees (Tr. 348-350). When Plunkert heard that Mensh was working on the deal he went to see

That part of the motion to vacate under Rule 60, F.R.C.P., dealing with newly discovered material evidence of a character probably changing the result of a new trial, unlike that part of the motion dealing with error of law apparent on the face of the record, requires a permissible reference to certain evidence at the trial. The broker Mensh, called as a hostile witness for appellants on the evidence in chief, denied in contradiction to his admissions before trial (Tr. 268-269) that appellees Morris Pollin and Dan Pollin (buyers) had agreed before the contract of sale was executed to reimburse him for the \$10,000., the brokers paid out of their commission to the attorneys for the trustees and to pay him an additional commission of one per cent (App. 50-52). When put to the test he perjured himself, perhaps from necessity, as to the reimbursement promise of the buyers because he had already sworn in his answer that he acted as *agent* for the trustees. After the buyers had their deed recorded they failed to reimburse him for those sums.

Morris Pollin and threatened that if he was not "cut in" on the deal that he would inform the trustees of that previous sale; whereupon Morris Pollin compelled the broker Mensh to bring him in the deal and to give him half the commission (Tr. 147-165). Shortly after the sale the buyers conveyed part of the trust property to Plunkert through his straw Spinks and Plunkert through his straw conveyed part of his adjoining property to the buyers in order to straighten up adjoining property lines. Of course, Plunkert concealed from the trustees his ownership of the adjoining property (Tr. 337-341; 301-336; Exbts. 23, 24, 25, 28, 29, 30). See also answer of Plunkert in which he denied Spinks was his straw and his testimony at the trial admitting that she was his straw. (Tr. 301-336). That the attorneys for the trustees knew both brokers were not really agents for the trustees, see testimony of writer of this brief at the trial that the attorneys told both brokers that they wanted \$10,000. out of the commission and if they did not get it there would be no contract (Tr. 268-269). See also Tr. 366; 103-108. The agreement for the payment of the \$10,000. between the brokers and attorneys for the trustees recited the consideration was for "legal services" (Exbt. 7). No legal services were rendered (App. 65-68).

Mensh consulted his attorney about the \$10,000. (App. 53-60; 61-64). Obviously there was no point in consulting his attorney if he was not trying to collect from the buyers. Ammerman, his attorney, also called as a hostile witness, was something less than frank about what happened (App. 53-59). The proffered testimony of a distinguished member of the bar contradicted Ammerman (App. 59). The writer of this brief testified that before trial Mensh, in his real estate office, told him that he had employed counsel to "sue" the Pollins to recover the \$10,000. and one per cent additional commission but that Ammerman could not handle the case because he was in the same office with Louis Ottenberg, Esq., who represented the buyers, but that he, Ammerman, would attempt to secure other counsel (App. 61-64); and further that the Pollins had told Mensh to "forget" about the idea of suing them and they would give him the exclusive sale of the first 100 houses they erected on the trust property (App. 63-64). This point about reimbursement of Mensh in lieu of payment of the \$10,000. and the additional commission of one per cent. was important to tie the buyers into additional participation in the bribe. Even though the buyers did not carry out their agreement with Mensh made before the contract of sale, their promise to him, although plainly illegal and unenforceable, effectively served its purpose. Among other things it "locked up" the deal for the buyers; it gave the fiduciaries an unlawful personal stake in the trust sale which caused them to take a hostile attitude toward the higher offer. Mensh also denied any reimbursement agreement (App. 49-52). Notwithstanding that the testimony of both Mensh and Plunkert shows that the buyers were informed on the same day the contract of sale was executed that the brokers were paying improperly \$10,000. to the attorneys for the trustees (App. 50) and the buyers were present at the settlement at the Title Company when the \$10,000. was actually paid over out of the purchase price some five weeks after

the date of the contract of sale (App. 54) the technique and fact of the reimbursement was important to show the personal participation of the buyers in the improper payment to fiduciaries. The newly discovered evidence set forth in the motion as verified, when added to the evidence already in the record, shows conclusively the participation of the buyers in the improper payment, fraud, and breach of trust. The newly discovered evidence also shows perjury in the testimony of Mensh at the trial, with the buyers and their attorneys sitting at the trial table and maintaining their silence when that perjured evidence was given. We refer again to the fact that all appellees and the attorneys for the buyers and brokers let the motion and supporting affidavit stand uncontradicted. The lack of candor in the testimony of Ammerman on the "reimbursement" aspect of the \$10,000. improper payment is also noteworthy. As the findings show that the trial Judge found that the brokers were agents of the buyers (App. 45, 46) and as the buyers are charged in law with the conduct and the same knowledge that their agents possessed (*Heilig Bros. Co. v. Kohler*, 366 Pa. 72, 76 A. 2d. 613), still responsibility on the doctrine of *respondent superior* is no substitute for evidence of actual participation in an improper payment to fiduciaries and trickery by having the agents of the buyers pose as agents for the sellers.⁵ Clearly, this newly discovered evidence would

⁵ See requests of all appellees for findings No. 15 which the trial Judge struck out in its entirety and refused to find (App. 42). The matter struck out reads as follows:

"The defendants Morris Pollin, Dan Pollin, Jack Pollin and Abe Pollin, and the Riggs Park Land Co., Inc. did not nor did any of them agree to reimburse the defendants Mensh and Plunkert for payment of said \$10,000., nor did they agree to pay to said defendants Mensh and Plunkert any compensation in connection with said sales contract."

The refusal to make the foregoing finding is either a finding that the buyers did participate in the improper payment or that there was substantial evidence of their participation, showing on its face

probably produce a different result on a new trial, which is all that appellants need show under Rule 60, F.R.C.P. to warrant a new trial. See *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U. S. 238, 248, 88 L. Ed. 1250, 64 S. Ct. 997; *Marshall v. Holmes*, 141 U. S. 589, 12 S. Ct. 62, 35 L. Ed. 870, where the court enjoined the enforcement of a judgment obtained through the use of forged documents and false testimony, conduct generally considered as intrinsic fraud, a distinction now abolished by Rule 60, F.R.C.P.; *Raffold Process Corp. v. Castanen Paper Co.*, 105 F. 2d. 126; *Eclipse Mach. Co. v. Harley-Davidson Motor Co.*, 286 F. 68, cert. den. 262 U. S. 743, 67 L. Ed. 1210, 43 S. Ct. 520; *Municipal Signal Co. v. Gamewell Fire-Alarm Tel. Co.*, 77 F. 452; *Hadden v. Ramsey Products*, 98 F. Supp. 988 (after-discovered fraud); and *City of Boston v. Santosuosso, Mass.*, 31 N. E. 2d. 564, which held that the theory of a verified motion which seeks a review of a decree on the ground of newly discovered evidence is that, by reason of the newly discovered evidence, a new case is made out which the court has never passed on.

The newly discovered evidence must be of such weight and character that on a rehearing of it, when added to the evidence already adduced, will probably produce a different result. *Zegura v. United States*, 104 F. 2d. 34, cert. den. 308 U. S. 586, 84 L. Ed. 490, 60 S. Ct. 109; *Obear-Nester Glass Co. v. Hartford-Empire Co.*, 61 F. 2d. 31; *Glade v. Allied Electric Products*, 135 F. 2d. 590.

The brokers and the buyers demonstrated their fraud against the trial court and appellants during the trial when the buyers commenced the construction of one hundred or more houses on the trust property in open defi-

the impropriety of summary disposition of the case on the evidence in chief. The inescapable inference is that the trial Judge did not seem to understand the issues framed and tried; nor the significance of the findings he actually made as well as what he refused to find.

ance of the *lis pendens* while the first appeal was pending in this Court in No. 10,996, and when the broker Mensh appeared on the scene after petition for certiorari was pending in October 1951 as the "exclusive" sales agent for those houses offered for sale by the appellee buyers. The motion to vacate was specific that the exclusive sales agreement was in existence at the time the perjured evidence was given at the trial, with the buyers maintaining their silence and reaping the benefit of that false evidence. Neither the brokers nor the buyers answered the verified motion. They could not answer it on the available evidence. These uncontroverted allegations showing fraud in procuring the judgment of dismissal in favor of all appellees seemed not to stir the trial Judge in the least. Point 7 alleges it was an abuse of discretion for the trial Judge to fail to order a general inquiry into this fraud at the trial by parties to the action. Certainly, it is of paramount importance that the courts move to maintain their integrity. What the trial Judge had in mind in overruling the motion is left in obscurity because there are no reasons, findings or opinion as to the basis for the order.

That portion of the motion under Rule 60, F.R.C.P. which deals with the inadvertence of counsel for the appellants in failing to elicit or prove the conviction of J. B. Shapiro for false pretenses was of importance in view of the perjury of Shapiro at the trial. The writer of this brief testified that he procured the higher offer from Shapiro, took it to both attorneys for the trustees and to the husband of the trustee who is involved in the improper payment (Tr. 232-237; 259-264; 282-284; 301-336). Shapiro, called as a hostile witness, denied he made the higher offer (Tr. 195-223). But his testimony, particularly his destruction of all his heavy file on the trust property before trial, as he claimed, and his admitted interest in the property for ten years, on its face made his testimony

suspicious. It was made far more suspicious by the evidence that Shapiro had formerly bought his plumbing supplies from the buyers of the trust property, as well as by other detail in the motion (Tr. 412D-412GG). David G. Bress, of this bar, testified that Shapiro turned over to him his personal notes on the higher offer (Tr. 280-281; 301-336), but that he had returned those notes to Shapiro before trial when he decided not to proceed with this case; and the notes could not be produced at the trial because Shapiro, as he claimed, had destroyed them. As Shapiro denied having made the higher offer (having already lost the property because the attorneys for the trustees and the husband of the trustee refused to meet him, which was after they acquired a \$10,000. stake in the performance of the Pollin contract) the trial Judge erroneously viewed the testimony of Smith and Bress *as being impeaching evidence which would not support an affirmative finding that there was a higher offer* (App. 48); hence, the finding that there was "no evidence" of the higher offer, which is a clear error of law apparent on the face of the record because the evidence given by Smith who procured the offer from Shapiro was that of a party to the transaction and it was impeaching as to Shapiro only incidentally. If the criminal record of Shapiro had been shown, it might have influenced the trial Judge to regard Shapiro as a witness unworthy of belief; and in that event the trial Judge might have regarded the evidence of Smith in a different light; i. e. as a party to the transaction. The trial Judge never questioned the credibility of Smith. As this case was disposed of on the evidence in chief there was no authority to direct a verdict on the law counts and to dismiss the equity count if there was any substantial evidence to support this important issue as to whether there was a higher offer of \$67,158. made to the trustees by Shapiro five weeks before they conveyed to the appellee buyers. If the evidence of a party to a transaction is valueless because it incidentally tends

to impeach the evidence of another party to the transaction, then there would seem no point in a plaintiff (carrying the burden of proof) ever impeaching any witness on the evidence in chief because he would merely prove himself out of court on his own case, leaving perjury and manipulation supreme.

This inadvertence of counsel was a material one in the circumstances presented here.

Motion of Appellants to Recall the Mandate in Cases 10,996 and 11,198

Appellants respectfully move this Honorable Court to recall its mandate in cases 10,996 and 11,198, where the Court dismissed both appeals. It must be obvious from reading this record that the court made a serious mistake in dismissing those appeals. The appeal in No. 10,996 urged fourteen substantial errors which plainly called for a reversal. The observation of this Court in No. 10,996, in dismissing apparently because of the mere length of appellants' brief, that the Court had read the "record" and found that "no injustice" would be done in dismissing the appeal, is plainly unsupportable. We, of course, insist that this appeal is well grounded; but it would be preferable to correct this situation by recalling those mandates so that the questions can be considered as on appeal rather than have the fate of the appeal depend upon the technical considerations sometimes applied in dealing with motions to vacate a judgment. Recall is also important because the ten infant appellants were assessed personally with costs on appeal in the sum of \$322., not yet paid, which is an unjust result in the face of this record. Recall would also permit this Court to dispose of this appeal simply by reversing the judgment of dismissal on the ground that the evidence in chief established prima facie every element of the complaint, as amended; and as this evidence disclosed a breach of trust

participated in by all appellees, the burden was cast on them to go forward with the evidence. See authority cited in footnote to supporting affidavit on the motion to vacate (App. 21); and *Jackson v. Smith*, 254 U. S. 586, 65, Ed. 418, 41 S. Ct. 200.

CONCLUSION

The order overruling the motion to vacate the judgment dismissing the complaint, as amended, should be reversed with directions to award a new trial. The reversal should also contain a direction to enter a summary judgment against the attorneys for the trustees and the husband of the trustee for the improper \$10,000. payment they received on the sale; and that a judgment should be entered against the brokers (Mensh and Plunkert) for all commissions received out of the trust estate and everything of value they received from the buyers, on the basis of their own testimony showing their fraud on the sale; and, thus, simplifying the issues on a new trial to that extent.

Respectfully submitted:

DAVID F. SMITH

Attorney for Appellants .

927 15th St. N. W.

Republic 1776

Washington, D. C.

APPENDIX

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United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 11,414

JOAN C. SMITH, ET AL., *Appellants*,

v.

MORRIS POLLIN, ET AL., *Appellees*.

Appeal from the United States District Court
for the District of Columbia

APPELLANTS APPENDIX

10 Filed Jan 30 1952 Harry M. Hull, Clerk

*Motion of Plaintiffs Under Rule 60, Federal Rules of Civil
Procedure, to Vacate and for Relief From a Final
Judgment Entered in the Above Cause on
February 8, 1951, Which Dismissed
the Complaint, as Amended.*

Now come the plaintiffs Joan C. Smith, Eleanore M. Smith and Robert A. Smith, infants, by David F. Smith, their father, next friend, and duly appointed guardian ad litem in Equity cause No. 59,573, United States District Court for the District of Columbia, and Anthony J. Smith, an infant by David F. Smith, his father and next friend, in their own right and on behalf of all other remaindermen under the will of Louis Kolipinski, deceased, and move against all of the above named defendants that this Honorable Court vacate and grant relief to the plaintiffs from a final judgment entered in the above cause on February 8, 1951, which dismissed the complaint, as amended and to grant a new trial in the above cause. This Court is reinvested with jurisdiction to decide the motion either by order of the United States Court of Appeals for the District of Columbia Circuit granting leave to file or by dismissal of an appeal from a judgment on the mandate. The grounds of the motion are as follows. (1) Mistake, inadvertence, surprise and excusable neglect; (2) Newly discovered material and controlling evidence of a character changing the result at the trial; (3) fraud committed on the court by the defendants; (4) error apparent appearing on the face of the record; and (5) other reasons justifying relief from the judgment.

1. The newly discovered material cordence is shown
by the attached affidavit of David F. Smith, counsel
11 for the plaintiffs, which is marked exhibit 1, and
prayed to be read as a part of this motion as to all
grounds set forth therein in addition to newly discovered
evidence. This newly discovered evidence was first dis-

covered by due diligence after a petition for a writ of certiorari was filed by plaintiffs in the Supreme Court of the United States on October 8, 1951, and was promptly brought to the attention of that Court by a petition for rehearing filed November 28, 1951, with a request for remand to the Court of Appeals for the consideration thereof, which petition for rehearing was denied on January 2, 1952. This newly discovered evidence is sufficient to reverse the result reached by this Court at the trial and to require a new trial in the interest of justice and the disposition of the case on the merits.

2. The judgment of February 8, 1951, resulted from fraud practiced against the trial court by the defendants Morris Pollin, Dan Pollin and Riggs Park Land Co., Inc., buyers of the trust property, Sidney Z. Mensh and Charles M. Plunkert, brokers on the sale, and by the witnesses J. B. Shapiro and H. Max Ammerman, which amounted to an obstruction of justice, placing in evidence a large volume of perjured testimony on material, decisive, and controlling issues as to which the plaintiffs prima facie carried the burden of proof. The proof to be adduced in support of this motion is reasonably expected to show that the attorneys for the buyers and brokers connived at that extensive perjury, and knowingly maintained their silence when such false and material testimony was given by the witnesses J. B. Shapiro, H. Max Ammerman, Sidney Z. Mensh, and Charles M. Plunkert, the latter two being defendants, which deceived the Court as to the true material facts in this case and resulted in an unconscionable judgment in favor of all defendants.

3. For manifest error appearing on the face of the record of a character formerly reviewable by a bill of review and bill in the nature of a bill of review now superceded by Rule 60, Federal Rules of Civil Procedure, the details of which are shown by the attached affidavit of David F. Smith, counsel for plaintiffs.

4. The inadvertence of counsel for plaintiffs in failing to adduce material evidence, which if considered by this Court would likely change the result of the trial, the details of which are set forth in the affidavit of David F. Smith.

5. Prejudice to the plaintiffs resulting from setting the case for trial over objection on eight days notice from the date the last pleading was in, which resulted in insufficient time to prepare for trial; and prejudice resulting from the order of the pre-trial judge and the trial judge in compelling the sole counsel for plaintiffs to act as both trial counsel and as a major witness for the
12 plaintiffs in a jury trial in violation of the due process clause of the Fifth Amendment of the Federal Constitution.

6. Plaintiffs request the Court to order a general inquiry into the fraud committee against the integrity of this Honorable Court; and plaintiffs further demand the right to adduce evidence in support of the grounds of this motion as on a plenary proceeding; and that this motion be treated as a plenary proceeding to the same extent as if these grounds had been raised by an independent action under Rule 60, F. R. C. P.

Joan C. Smith, Eleanore M. Smith, and Robert A. Smith, infants, by David F. Smith, their father, next friend and guardian ad litem in Equity cause 59,573, this Court, and Anthony J. Smith, an infant by David F. Smith, his father and next friend, in their own right and on behalf of all other plaintiffs to this class action.

/s/ David F. Smith
David F. Smith
David F. Smith, in his capacity above stated,
927 - 15th St., N. W.
Washington, D. C.
Republic 1776

Rule 60, Federal Rule of Civil Procedure, as amended, provides insofar as pertinent here as follows:

"Rule 60, Relief From Judgment or Order:

(b) Mistakes; Inadvertence, Excusable neglect; Newly discovered evidence; Fraud, etc. On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) Mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59b; (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; . . . or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to grant relief to a defendant not actually personally notified as provided in Title 28, USC, par. 1655, or to set aside a judgment for fraud upon the court. Writ of coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of a bill of review are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by independent action."

1. A final judgment was entered in this cause dismissing the complaint, as amended on February 8, 1951. This Court is reinvested with jurisdiction.

2. The newly discovered material evidence which, if received would change the result at the trial, was first discovered in the exercise of due diligence after a petition for a writ of certiorari was filed in the Supreme Court on October 8, 1951, to review a decision of the Court of Appeals dismissing an appeal from the judgment of dismissal of February 8, 1951, and that newly discovered evidence was promptly brought to the attention of the Supreme Court by a petition for rehearing filed on November 28, 1951, in which the Supreme Court was asked to remand for its consideration by the Court of Appeals and which petition for rehearing was denied on January 2, 1952. A copy of said petition for certiorari, petition for rehearing, and affidavit showing the newly discovered evidence is attached hereto as exhibits 2, 3 and 4, and prayed to be read as a part of this motion on the question of diligence.

14 3. The newly discovered evidence shows fraud and the use of perjured testimony on critical and material issues by the defendants which resulted in an unjust judgment in their favor and more pointedly, by the use knowingly of perjured testimony of the witnesses and defendants, Mensh and Plunkert and J. B. Shapiro and H. Max Ammerman on determinative issues in the case by at least the defendants Morris Pollin, Dan Pollin and Riggs Park Land Co., Inc., in which family corporation the Pollins held the offices of President and Secretary and Sidney Z. Mensh and Charles M. Plunkert. The newly discovered evidence shows the personal participation of the buyers in the improper \$10,000. payment to the fiduciaries in connection with the contract of sale and conveyance of the 82 acres of trust property. A full hearing is requested, with the right to call witnesses and produce documents to show that the court was misled and deceived at the trial, and that equity and good conscience demand

that the judgment of dismissal of the complaint on February 8, 1951, should be vacated and a new trial awarded.

4. This Court has inherent power, and also power under Rule 60, Federal Rules of Civil Procedure, to set aside a judgment procured by fraud of the defendants in the procurement and use of false material testimony by the witnesses, Mensh, Plunkert, J. B. Shapiro and H. Max Ammerman. *Hazel-Atlas Glass Co., v. Hartford-Empire Co.*, 322 U. S. 238, 248, 88 L. Ed. 1250, 64 S. Ct. 997; *Freeman on Judgments*, Fifth Ed. Vol. 3, sec. 1213, p. 2519. See also *Universal Oil Products v. Root Refining Co.*, 328 U. S. at p. 580, 90 L. Ed. at p. 1447, 66 S. Ct. at p. 1179, where Justice Frankfurter said:

“The inherent power of a federal court to investigate whether a judgment was obtained by fraud is beyond question. (citing *Hazel-Atlas Glass Co., v. Hartford Empire Co.*, (supra)). The power to unearth such a fraud is the power to unearth it effectively.” See also, *Hadden v. Ramsey Products*, 96 F. Supp. 988.

5. As to the scope of the remedy under Rule 60, F.R.C.P. see, *Barron & Holtzoff*, discussion of that rule; *Oliver v. City of Shattuck*, ex rel. *Versluis*, C. C. A. 10th, 1946, 157 F. 2d 150, 152, 153; *Kwasizur v. Cardillo*, C.C.A. 3d, 1949, 175 F. 2d. 235, cert. den. 338 U. S. 880, 70 S. Ct. 150. Compare, *Frazer v. Doing*, 76 U. S. App. D. C. 111, 130 F. 2d 617. *Klapprott v. United States*, 335 U. S. 601, 69 S. Ct. 384; *Fiske v. Buder*, C. C. A. 8th, 1941, 125 F. 2d 841, 5 F. R. Serv. 60b. 51, Case 1; *Greespahn v. Joseph A. Seagram & Sons*, C. C. A. 2d, 186 F. 2d. 616. As to fraud predicated on the silence of attorneys for a party when there was an obligation to speak, and its relation to the inherent power of the court and to Rule 60, F. R. C. P., see *Hadden v. Ramsey Products*, 96 F. Supp. 988, 991, where the court said: “failure of the attorney to speak when he should have spoken and to disclose to the court

the known claim of defendants with respect to the
 16 validity of the notes. In other words, suppression
 of the truth is equivalent to a false statement.
Fleming v. Slocum, 18 Johns 403". See also, *Tozer v.*
Chas. A. Krause Mill Co., 189 F. 2d 242, holding that
 Rule 60, F. R. C. P. must be given a liberal construction.

With respect to the difficulty of proof in fraud cases
 and the necessity to examine hostile witnesses and the ap-
 proach to an appraisal of their testimony see *Bradley v.*
Davidson 47 App. D. C. 266, 284 where the court said;
 "In *Dumas v. Clayton*, 32 App. D. C. 566, 574, this court
 said: "In cases like this, it is generally necessary to call and
 examine the parties to the alleged fraud, and because of
 their adverse interest they may be treated as witnesses
 on cross-examination. The object of the right of such
 cross-examination is to draw out of an unwilling witness
 all such circumstances as may tend to establish the per-
 petration of the fraud. If a witness makes a direct state-
 ment, and then discloses circumstances inconsistent there-
 with, it is for the jury or court to determine what is to be
 believed".

6. The inadvertence of counsel for the plaintiffs in the
 hurry and surprise at the large amount of perjury in the
 trial to bring out that the witness J. B. Shapiro, who
 made a substantially higher offer for the trust property
 before conveyance, was convicted in this Court of false
 pretense, is a material omission which, if it had been
 known to the Court at the trial, would have put the credi-
 bility of the witness in a new light and would have ma-
 terially affected the result of the trial, at least to the
 extent of requiring the defendants to go forward with
 their evidence.

7. That the findings do not support the judgment
 sought to be vacated is error on the face of the record,

formerly receivable by bill of review and coram nobis, and now reviewable at least to the same extent under Rule 60, F.R.C.P. Cf. *Oliver v. City of Shattuck*, ex rel. *Verslius*, C.C.A. 10th, 1946, 157 F. 2d 150, 152, 153; and cases cited in separate opinion of Justice Roberts in *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, supra.

16 Filed Jan 30 1952 Harry M. Hull, Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JOAN C. SMITH, et al.

Plaintiffs

vs.

MORRIS POLLIN, et al.

Defendants

Civil Action 5504—50

Affidavit of David F. Smith

District of Columbia, ss:

David F. Smith, being first duly sworn according to law, upon oath deposes and says that he has been a member of the bar of this Honorable Court for the past twenty-seven years and he has personal knowledge, except where specifically qualified in the text, of the facts hereinafter set forth:

1. The affiant served as sole counsel for the plaintiffs at the trial of the above cause in the District Court of the United States for the District of Columbia and upon all appellate proceedings.

The complaint in this case alleged that the contract for the sale and conveyance of the trust property in dispute was procured, induced and influenced by the improper

payment of \$10,000 by the defendants, Morris Pollin and Dan Pollin, buyers of the trust property, who are and were President and Secretary of the Riggs Parks Land Co., Inc., a Delaware corporation, in whose name title was taken, to the trustees, the husband of a trustee and two attorneys for the trustees, all of whom are defendants here; and that the technique employed in the bribery was for the defendants Mensh and Plunkert, real estate agents, to pay that sum out of their real estate commission of 5% on the sale (\$28,671), which the trustees had agreed to pay, with an agreement on the part of defendants Morris Pollin and Dan Pollin before the contract of sale was obtained from the trustees to reimburse Mensh for the entire \$10,000 payment.

2. The evidence at the trial showed a side agreement between the brokers and two attorneys for the trustees to pay the \$10,000 out of the commission agreed to be paid by the trustees which was executed in the office of the attorney for the trustee concurrently with the contract of sale dated April 21, 1950 (Exh. 7); and a supplemental agreement between the brokers and the two attorneys for the trustees and the husband of the trustee
17 Bucy executed July 14, 1950, for the payment of said \$10,000 out of commission, which was the same day the trustees delivered their deed (Exhs. 9, 8, 10, 10(a)).

The uncontradicted evidence also showed that on April 21, 1950, the defendants Morris Pollin and Dan Pollin were told by the brokers of the \$10,000 payment to said fiduciaries (Transcript 109); and that the buyers were present at the settlement of the sale on July 14, 1950, when the \$10,000 was paid over to the two attorneys for the trustees and the husband of the trustee Bucy, in equal division, in the presence of the trustee Bucy (Transcript 165-174).

The affiant testified at the trial that the defendant Mensh stated to him before trial in the office of Mensh that he (Mensh) could not get a contract of sale without paying the lawyers for the trustees \$10,000 out of the commission; that before the contract he told Morris Pollin and Dan Pollin that he could not get a contract without such payment and they (Pollins) told him to go ahead and pay it to the attorneys and they (Pollins) would reimburse him for that payment, and also pay an additional commission of one per cent; that after the deed was delivered Morris Pollin and Dan Pollin failed to reimburse him for that payment and Mensh consulted H. Max Ammerman, his attorney, about collecting; that Morris Pollin and Dan Pollin told Mensh to "forget" about the idea of suing, and in lieu thereof, they would give him the exclusive sale of the first one hundred houses they built on the trust property. (Transcript 267, 268, 269). Other corroborating testimony of the foregoing transactions appears in the transcript 110-112; 185-195.

3. However, when the defendant Mensh was called as a hostile witness by plaintiffs, he denied under oath that Morris Pollin and Dan Pollin had agreed to reimburse him for the \$10,000 payment and he denied a supplemental agreement on their part in lieu thereof to give him the exclusive sale of the first one hundred houses the Pollins erected on the trust property (Transcript 113, 114), but he admitted that the buyers knew about that payment in the following testimony:

(Transcript 109):

"Q. And you (Mensh) had no conversation at all with either Morris Pollin or Dan Pollin about your giving up the \$10,000 out of the Commission? A. We certainly mentioned it to them at the time that the contract was signed, that we had to give it up, certainly. And they knew all the phases of the deal.

Q. Who did you mention it to? A. To Morris and Dan (Pollin). After the contract was signed. We delivered it to them that night, Mr. Plunkert and myself, and told them exactly what went on."

18 4. After this case was in the Court of Appeals the defendants Morris Pollin and Dan Pollin, through their family corporations, Riggs Park Land Co., Inc., Morris Pollin & Sons, and Dan Pollin, Inc., in which the defendants Pollin are respectively President and Secretary, commenced the construction of about one hundred semi-detached brick houses on the trust property in dispute in wilful defiance of the lis pendens against the property arising out of the first count for rescission, and recently offered the houses for sale under an indemnity agreement to protect the title company in passing title.

After the petition for certiorari was filed in the Supreme Court on October 8, 1951, affiant discovered for the first time that the defendant Mensh had been employed by the defendants Morris Pollin and Dan Pollin, as the exclusive sales agent for the sale of the foregoing one hundred houses erected on the trust property; that upon information and belief that such exclusive sales agreement was in existence at the time Mensh testified falsely to the contrary at the trial with the full knowledge of the attorneys for the buyers and brokers; that Mensh erected a large sign on the trust property describing himself as the "exclusive agent" for the defendant Pollins; that large advertisements paid for by Mensh with the knowledge of the defendants Pollin appeared in the Washington Post newspaper under dates October 20, 28, November 4 and 25, 1951, and January 5 and 13, 1952, advertising the aforesaid houses for sale, containing a photograph of two of those houses, and stating that Mensh was agent for those "Pollin-Built" houses, which were "built by Morris Pollin & Sons, Inc., and Dan Pol-

lin, Inc." who were grantees of the lots on which those houses were built after the lis pendens went on the property on December 19, 1950. In paid advertisements by Mensh on radio station WRC, broadcast at 12:15 P.M. on Sundays, November 18 and 25, 1951, affiant personally heard broadcasts of the sale of the foregoing houses on the trust property which described Mensh with the knowledge of the defendants Pollin as the "exclusive agent" of the defendants Pollin and their family corporations. The foregoing newspaper advertisements dated January 5 and 13, 1952, are attached hereto as exhibits. These exhibits are substantially the same as the previous advertisements which are now on file in the Supreme Court of the United States in Misc. No. 165 in the above case.

6. The foregoing evidence newly discovered since the petition for certiorari was filed on October 8, 1951, will demonstrate perjury in the testimony of Mensh at the trial and it is material evidence to show the instigation and participation of the defendants Pollin in the improper payment of \$10,000 by the buyers and their agents, who were the brokers Mensh and Plunkert, to the fiduciaries in connection with the sale and conveyance.

19 This newly discovered evidence is of critical importance to the case of plaintiffs, would produce a different result on trial and warrants a new trial. This evidence first discovered since the petition for certiorari was filed could not have been discovered sooner because it was not in existence, and with issues before the courts involving this very matter of fraud, affiant had no reason to suppose that the defendants would openly carry out and demonstrate their fraud while the case was yet before the courts.

In the trial court all of the defendants contended in their answers and pre-trial proceedings, that the brokers, Mensh and Plunkert, were agents of the Kolipinski trus-

tees in the sale but the trial court refused a request of the defendants to make such a finding, and the remarks of the court clearly show that the trial judge was of the view that the brokers were agents of Morris Pollin, Dan Pollin and Riggs Park Land Co., Inc., which is what all the evidence showed (Transcript, 412, H. I. J; Exhs. 2, 7, 8, 9, 10, 10(a), 11, 13, 14, 15 15(a), 18, 19, 20). However, the trial judge made no specific finding on that vital aspect of the case. The only evidence connecting the buyers with the improper payment personally was the above outlined matter and the trial court made no finding at all as to the connection of the buyers personally with the improper payment. Neither of the buyers testified at the trial.

7. The foregoing newly discovered evidence, first discovered by affiant after the petition for certiorari in the Supreme Court was filed on October 8, 1951, was promptly brought to the attention of the Supreme Court by petition for rehearing filed November 28, 1951, with a request, among other things that the Supreme Court remand the case to the Court of Appeals for its consideration of this newly discovered evidence. The petition for rehearing was denied on January 2, 1952. A copy of said petition for certiorari and petition for rehearing is attached hereto together with the affidavit of affiant in that proceeding.

8. J. B. Shapiro, a real estate dealer, was called as a hostile witness on plaintiffs' case in chief to prove, in corroboration of the testimony of affiant, that Shapiro made a higher offer of \$7,700 per acre for the trust property five weeks before the trustees conveyed to the defendants Pollin and their family corporation, Riggs Park Land Co., Inc., on July 14, 1950, which was \$67,158 higher than the price at which the trustees sold the trust property. Shapiro denied under oath that he made any offer, but

the court will notice in his testimony admissions of strange conduct for a man who had shown such interest in the property during a period of ten years. Affiant, as counsel was surprised at the foregoing perjury of Shapiro, and called as impeaching witnesses, David G. Bress, Esq., to whom Shapiro had delivered notes made in the presence of affiant in his own handwriting showing the higher offer, which Mr. Bress in violation of
 20 an understanding with affiant had returned to Shapiro, and which Shapiro testified he had destroyed along with his file on the trust property before the trial, and Irving Goldstein, Esq.

J. B. Shapiro was convicted in the United States District Court, holding a criminal term, on an indictment charging false pretenses in connection with a real estate transaction, about fifteen years ago, and he was placed on probation. Affiant knew of that conviction when he called Shapiro as a hostile witness but through an inadvertence failed to elicit that fact from Shapiro. This was an error and inadvertence on the part of affiant which ought not to be permitted to prejudice the rights of the ten (10) infant plaintiffs. If the trial judge had been apprized of that conviction, the result would probably have been different, for the trial court, apparently overlooking the testimony of affiant who procured the higher offer and insisted that the fiduciaries act upon it, treated the testimony of affiant, Bress and Goldstein as being impeaching evidence only which could not be the basis for an affirmative finding of fact about the higher offer, and apparently crediting the perjured denial of Shapiro, finally arrived at the erroneous conclusion that there was "no evidence" of a higher offer. Compare, Wigmore on evidence, 2nd Ed. Vol. 2, sec. 1018, where the foregoing rule applied by the trial judge is sharply criticized. The trial judge was clearly deceived by the per-

jury of Shapiro and had the conviction of Shapiro for false pretenses been shown a new light would have been cast on his testimony.

Upon information and belief affiant alleges that the defendants, Morris Pollin and Dan Pollin, buyers, connived at and procured the foregoing perjured testimony of Shapiro. Among other things, reference is made to the proffer of evidence of affiant at the trial which showed that Shapiro had bought his plumbing supplies from Morris Pollin and Dan Pollin for many years, the admitted conversation of Shapiro with Morris Pollin about this case at the Jewish Community Center before the trial, and the warm embrace of all three men (Morris and Dan Pollin and Shapiro) in the corridor of this court house at the time Shapiro was subpoenaed at the trial. The circumstances under which Mr. Bress returned the notes of Shapiro to him, and the destruction of these notes and his entire file, as claimed by Shapiro, when he knew from many sources that this case was about to be tried and that he would be a principal witness, warrant a full inquiry by this Court. Reference is made also to the admission of the defendant Charles M. Plunkert, called as a hostile witness that the defendant, Spinks was his straw, contrary to the perjury in his sworn answer to the contrary; and also to the "blackmail" of Morris and Dan Pollin by Plunkert as shown by the uncontradicted testimony of Adlai Mann, which conduct in itself constituted a breach of trust as the brokers claimed to be agents of the trustees.

21 9. H. Max Ammerman, Attorney for the brokers Mensh and Plunkert, defendants was called as a hostile witness at this trial to impeach Mensh. Ammerman testified that Mensh came to his law office and consulted him about the \$10,000. payment to the lawyers for the trustees out of the real estate commission after the deed was delivered but that Mensh came to see him only

as a long time "friend". At the time affiant served a subpoena on Mensh, in the office of Mensh, Mensh told this affiant that Ammerman had charged him more than \$1,000. for legal fees at the inception of this case and contrary to the previous statement of Mensh that Morris Pollin and Dan Pollin had given him a "grand turning around" on the sale, he then stated that Morris Pollin and Dan Pollin were "honorable men."

Manifest error appears on the face of the record of the trial in the exclusion of the proffered testimony of Arthur J. Hilland, Esq., which clearly impeached the testimony of Ammerman that he had not sought to employ Mr. Hilland to sue the defendants Pollin to recover the \$10,000 paid out of commission.

10. The defendant Charles M. Plunkert, called as a hostile witness by plaintiffs in the circumstances of this fraud case, gave perjured testimony when he denied in contradiction of his positive statements to affiant before trial, as testified to by affiant, that the trustees knew about the \$10,000 improper payment at the time the contract of sale was executed. Upon information and belief, affiant says that a full inquiry by the Court will probably disclose that the trustee, Henrietta K. Evans, who lives on an island in upstate New York, knew nothing about that improper payment before this action was filed, and that if the trustee, Emilie K. Buey, knew anything at all about such payment that she was cooperating with and falsely protecting her husband, the defendant, Charles W. Buey, in a breach of trust, the uncontradicted testimony having showed that her husband got \$3,333.33 out of the improper payment at the time the deed to the trust property was delivered.

11. Manifest error and a gross miscarriage of justice appears on the face of the record from the action of the

trial judge in summarily directing a verdict on the third and fourth law counts and in summarily dismissing the first count for recision on the evidence in chief, which was clearly substantial and under the special rule of evidence applied in fiduciary relations, cast the burden on the trustees, husband of a trustee, two attorneys for the trustees, brokers claiming to act as agents for the trustees which the trial judge denied, and the buyers to make a full explanation of their conduct and breach of trust.

12. Upon information and belief, affiant says that a full inquiry by the court will reveal connivance and joint effort by the defendants Morris Pollin, Dan Pollin, Sidney Z. Mensh, Charles M. Plunkert and by the witness J. B.

22 Shapiro to obstruct the administration of justice in this case, to deceive the court by false testimony with respect to material issues involved in the trial and to cause the witness Shapiro to destroy his notes and records on the higher offer and interest in the trust property; and that certain of counsel for the defense representing the buyers and brokers knew at the trial that the witnesses Mensh, Plunkert, Shapiro and H. Max Ammerman had committed perjury with respect to a large part of their testimony, as to which they maintained silence, thereby misleading and deceiving this Honorable Court. In this connection the Court will notice singularly the almost total absence of cross-examination of witnesses by the defense. The conduct set forth in this affidavit had a material and decisive bearing on the decision and order of the Court dismissing the complaint on February 8, 1951; and if the Court had the benefit of the foregoing facts and further facts relating to fraud upon the Court, to be adduced at the hearing of the motion to vacate said judgment of February 8, 1951, the Court would have reached a different result, and required the defendants to go forward with their proof.

13. In order to preserve the integrity of this Honorable Court and to right a gross injustice in this case, the Court is requested to order a general inquiry into the fraud committed upon the Court by the defendants in this trial, and failing that, that counsel for plaintiffs in a plenary proceeding be permitted to call witnesses and produce documents to demonstrate the fraud and bad faith which deceived the Court to the benefit of the defendants; and that plaintiffs be allowed to prove said newly discovered evidence.

14. Manifest error appears on the face of the record to the prejudice of plaintiffs because the Court has made findings of fact which clearly show that two attorneys for the trustees and the husband of a trustee received \$10,000, out of the real estate commission of \$28,671, which the trustees contracted to pay to the brokers Mensh and Plunkert. This finding alone shows a violation of a criminal statute (D.C. Code, Title 45, sections 1414, 1416). As the Court refused to find that Mensh and Plunkert acted as agents for the trustees, as requested by the defendants at the time the findings were settled by Judge Holtzoff, the Court has found that the fiduciaries took that \$10,000 from the agents of the buyers, who were charged with the same knowledge their agents had in the transaction. The finding itself, together with the statements of the Court, shows on its face that the fiduciaries entered into an inconsistent relation, necessarily antagonistic to the interests of the plaintiff beneficiaries of the trust estate, and that the Court committed manifest error in making a summary disposition of the case on the evidence in chief.

23 15. Further error appears on the face of the record for the reason that the findings together with the refusal of the trial judge to find that the brokers were agents of the trustees, shows unmistakably that the

brokers secretly represented both buyer and seller and they were plainly guilty of a breach of trust. The trial court overlooked and made no disposition of that part of the first count which sought recovery of \$28,671.00 the brokers fraudulently and in breach of trust collected out of this trust estate. (See *Wechler v. Bowman*, 285 N.Y. 284, 34 N.E. 2d 322, 134 ALR 1337, and cases cited; *Little v. Phipps*, 207 Mass. 331, 94 N.E. 260.)

16. The defendants Emilie K. Bucy and Henrietta K. Evans, trustees of the estate of Louis Kolipinski deceased, and the husband of the trustee Bucy and the defendants, Michael M. Doyle and Thomas F. Burke, attorneys for the trustees, all of whom were fiduciaries having admitted in their sworn answers that they received \$10,000 out of the real estate commission of the defendants, Mensh and Plunkert, who were also fiduciaries on their claim and position in this case that they were agents of the trustees on the sale, as to which this Court found otherwise, error apparent appears on the face of the record in dismissing the complaint for the reason that the admitted conduct of all these fiduciaries shows a violation of criminal law (D.C. Code, 1940, 45-1414, 1416) and a breach of trust by the trustees, attorneys for the trustees and brokers because said answers and the findings show that the fiduciaries received unlawfully \$10,000 from the agents of the buyers on the sale of trust property; and that this sort of conduct necessarily and in its inevitable effect and tendency involves disloyalty to the beneficiaries of the trust, entering into inconsistent relations, lack of a "single eye" on the part of fiduciaries, and otherwise intolerable conduct in the administration of trust estate. Further error apparent on the face of the record appears because the admissions of the trustees, attorneys for the trustees, husband of a trustee, and the brokers, with respect to the \$10,000. improper payment, cast the entire burden of proof on those fiduciaries as matter of law,

and, therefore there was no conceivable ground for directing a verdict and summary dismissal of the first court for recision on the evidence in chief of the plaintiffs. This point will be made clear by reference to the decisions below.¹

24 17. Finally, the order of the pre-trial judge setting this case for trial eight days from the last pleading of the defendants was in, resulted in gross prejudice to the infant plaintiffs and inadequate preparation for trial, particularly with respect to cumulative evidence to show the fair market value of the trust property at the date of sale; and this was all the more emphasized because the pre-trial court and the trial court compelled affiant to act as both sole trial counsel and as a major witness for plaintiffs in a jury trial.

18. Affiant requests the opportunity to prove the foregoing facts in a plenary proceeding, which is expected to show additional evidence of a fraud against this Honorable Court by the defendants, which resulted in a material way in producing the judgment of dismissal in their favor.

19. Nothing contained in this affidavit involves Edwin Shelton, Esq., one of the attorneys for Morris Pollin and Dan Pollin, who took no active part in the trial; nor as to David A. Hart, Esq., whose client Charles M. Plunkert was largely represented at the trial by H. Max Ammerman, who also represented the other broker Mensh.

/s/ David F. Smith
DAVID F. SMITH

¹ Goodrum V. Clements, 51 app. D. C. 184, 189; Holman V. Ryan, 61 app. D. C. 10, 56 F. 2d 307; Crocheron V. Savage, 75 N. Y. Eq. 589, 596, 73A 33; Matter of Richardson's Will, 266 N. Y. S. 388, 149 misc. 192; Oil, Inc. V. Martin 381 Ill. 11, 44 N. E. 2d 596; Franklin V. Mortgage Guaranty & Security Co., 57 F. 2d 834; Gragg V. Pruitt, 179 Ckl. 369, 65 P. 2d 994.

Subscribed and sworn to before before me this 17th day of January, 1952.

/s/ Charlotte Maskey
Charlotte Maskey
Notary Public, D. C.

1 Filed Apr 23 1952 Harry M. Hull, Clerk

March 5, 1952

The above-entitled cause came on for hearing before the HONORABLE ALEXANDER HOLTZOFF at 10:15 a.m., Wednesday, March 5, 1952.

APPEARANCES:

DAVID F. SMITH Esq., for the plaintiffs;
EDMUND D. CAMPBELL, Esq., and
MICHAEL M. DOYLE, Esq.,
for the defendant.

Proceedings

MR. SMITH: If Your Honor please, this matter is here on a motion to vacate the judgment entered by Your Honor on February 8, 1951, which dismissed the complaint. That judgment followed the action of Your Honor in directing a verdict on the third and fourth counts and dismissing the first count for recision on the evidence in chief.

2 The papers in this case are rather lengthy, and if I might take ten minutes to explain the background.

THE COURT: Tell me briefly what the motion is about without taking ten minutes.

MR. SMITH: The motion is based on five grounds. The first ground is that there is newly discovered ma-

terial evidence of a character which would change the result on a new trial. The second ground is that a fraud was committed on Your Honor during the trial of this case by two defendant witnesses by giving testimony known to be false.

THE COURT: That I shall not consider, because if I had to retry the veracity of every witness a second or third time, we would never end litigation.

MR. SMITH: This perjury was committed by two defendants in the case, which resulted in judgment in their favor.

THE COURT: What is the perjury that is claimed, specifically?

MR. SMITH: Your Honor will recall this was an action for fraud.

THE COURT: I recall the case very well. What is the perjury you claim was committed by witnesses?

MR. SMITH: It was in connection with the reimbursement agreement with respect to the \$10,000, which we allege is nothing more than a bribe paid to the fiduciaries by the buyers and their agents.

3 THE COURT: We spent a week trying it, I denied the motion for new trial, it went to the Court of Appeals,—

MR. SMITH: There was no motion for new trial in this case, Your Honor.

THE COURT: Well, it went to the Court of Appeals and they dismissed the appeal. Now you come back to this Court.

MR. SMITH: On the 29th of January the Court of Appeals entered a per curiam in this case which gave us permission to proceed with this motion before Your Honor, and the Court of Appeals said in the per curiam that if Your Honor was inclined to grant this motion they would remand this case back to this Court.

THE COURT: Do you agree there was such a statement?

MR. CAMPBELL: No. That is not accurate.

MR. SMITH: The per curiam is in the file.

MR. CAMPBELL: The United States Court of Appeals applied in civil cases the rule applicable in criminal cases, and said that this Court could determine whether or not it was interested in granting the motion; that if it desired to grant the motion, Mr. Smith could then advise the Court.

THE COURT: Please be as brief as you can.

MR. SMITH: I was going to suggest that the motion and my supporting affidavit stands uncontradicted. It has been a matter of some surprise to me that neither defendants nor their counsel have filed anything but
4 points and authorities. In view of the length of the papers, I would suggest that Your Honor take these papers and read them, and in my view we are entitled to an order on the uncontradicted showing here. If Your Honor is of a different opinion, we would like to take testimony.

THE COURT: I am not sure I should take testimony. I will be glad to read the papers and take the matter under advisement.

MR. SMITH: These motions under Rule 60 to vacate are really plenary proceedings. In this motion there are additional grounds which involve the old bill of review, errors based on the findings and judgment, and that is fully set forth. It may be that Your Honor, on a mere reading of the uncontradicted showing made by these papers, would be inclined to act without the necessity for us to take testimony, if Your Honor would be good enough to read these papers.

THE COURT: I will be glad to do that. I am not sure that I shall want to take testimony. I will go over

the motion and the supporting and opposing papers and rule on it.

MR. SMITH: May I be excused now, Your Honor?

THE COURT: Yes.

MR. DOYLE: After the Court shall have read the papers as suggested by Mr. Smith, we would be
5 glad to be heard if the Court is in doubt.

THE COURT: If I feel oral argument is necessary, I will set it down for oral argument, or dispose of the matter without oral argument.

* * * *

6

March 10, 1952

The above-entitled cause came on for hearing before the HONORABLE ALEXANDER HOLTZOFF at 10:00 a.m., March 10, 1952.

APPEARANCES:

DAVID F. SMITH, Esq., for the plaintiffs;
EDMUND D. CAMPBELL, Esq., and
MICHAEL M. DOYLE, Esq.,
for the defendant.

Proceedings

MR. CAMPBELL: If the Court please, in the case of Smith v. Pollin I am submitting an order in conformity with Your Honor's ruling. I have shown it to Mr. Smith. I understand he has some comments to make.

MR. SMITH: Your Honor, I have some objections.
7 tions. I have put them in writing and ask that the stenographer copy them into the record.

THE COURT: I will examine these objections. I will go over them and hand down a decision later.

MR. SMITH: Your Honor, I would like my objections made a part of the record.

THE COURT: They will be made a part of the record.
(The objections above referred to are as follows:)

**“OBJECTIONS OF PLAINTIFFS TO ORDER DENY-
ING MOTION TO VACATE AND FOR RELIEF
FROM JUDGMENT OF FEBRUARY 8, 1951.**

“Plaintiffs respectfully request that the record show the following objections were made in open Court before the entry of the order:

“1. The Court has denied a hearing upon the motion, which is plenary in character, in violation of the due process clause of the Fifth Amendment to the Federal Constitution, and 28 U.S.C.A. Sec. 1654.

“2. The Court has assigned no reasons for denying the motion and has failed to find specially the facts on a plenary proceeding, especially in view of the allegations raising questions formerly reviewable on bill of review and writ of coram nobis.

“3. As the motion and supporting affidavit stand uncontradicted, it is an abuse of discretion for the Court to deny the motion, and to deny an opportunity
8 to produce testimony in open court in support of the motion and additional facts likely to be disclosed by the examination of witnesses.

“4. The action of the Court is arbitrary and an abuse of discretion.

“5. Plaintiffs are entitled to an order vacating the judgment on the uncontradicted showing made in the motion and supporting affidavit.

“6. The allegations in support of the motion are so far out of the usual run of cases, that the Court abused its discretion in failing to allow counsel an opportunity to argue the motion; and in any event, in failing of its

own motion to conduct an inquiry into a fraud committed against this court by parties to the action.”

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31 Filed Mar 6 1952 Harry M. Hull, Clerk

Memorandum

Motion to vacate and for relief from final judgment, is denied.

/s/ Alexander Holtzoff
United States District Judge

• • • •

34 Filed Mar 10 1952 Harry M. Hull, Clerk

*Order Overruling Plaintiffs' Motion
to Vacate Judgment*

This action came on to be heard upon motion of plaintiffs to vacate and for relief from final judgment entered herein on February 8, 1951, which dismissed the complaint as amended, and upon consideration thereof, it is by the Court this 10 day of March, 1952,

ORDERED that said motion be and the same is hereby overruled.

/s/ Alexander Holtzoff
Judge

• • • •

587 Filed Jan 26 1951 Harry M. Hull, Clerk

APPENDIX

**UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF COLUMBIA**

JOAN C. SMITH, et al

Plaintiff.

vs.

MORRIS POLLIN, et al.

Defendant.

Calendar No.

Civil Action No. 5504-50

Pretrial Proceedings

STATEMENT OF NATURE OF CASE:

Statement of Plaintiff's Claim

Plaintiff David F. Smith files this action claiming to be guardian *ad litem* of three of the minor plaintiffs and next friend of the fourth (he being their father), said minor plaintiffs being remaindermen in a trust established under the will of Louis Kolipinski, deceased. Action is brought on behalf of plaintiffs and others similarly situated.

Count One sounds in equity and constitutes a *lis pendens* upon the property here involved. The remaining three counts are law counts seeking damages. Jury trial demanded by plaintiff.

Count One

Plaintiff seeks to have the court rescind the sale of approximately eighty-two acres of unimproved land located in the District of Columbia conveyed on July 14, 1950,

by defendants Emilie K. Bucy and Henrietta K. Evans, trustees under the Kolipinski will, to the defendant Riggs Park Land Co., Inc. for approximately \$574,000, and to pay off a loan and to release a deed of trust, placed upon said property by the purchasing defendant Riggs Park Land Co., Inc. at time of settlement of the sale, running to defendants Crowell and Scrivener, as trustees, securing a loan from the defendant Perpetual Building Association in the amount of \$373,435.52.

Plaintiff charges (1) that court approval or ratification of the sale was necessary and was not procured by the defendant trustees of the Kolipinski trust; and (2) that all of the defendants except Perpetual Building Association and Crowell and Scrivener, its trustees, conspired to defraud the minor plaintiffs by selling said property at less than its fair market value, and \$67,158 less than an offer claimed by plaintiff to have been received prior to consummation of the sale. Plaintiff charges that in furtherance of said conspiracy (1) the defendants Pollin, Riggs Park Land Co., Inc., and the defendants Mensh and Plunkert (who were the real estate brokers making the sale) paid the defendants Doyle, Burke and Charles W. Bucy (who were attorneys for the defendant trustees of the Kolipinski trust) the sum of \$10,000 out of the real estate commission due Mensh and Plunkert in the sale, in order to obtain the contract for sale of the property from the defendant trustees without regard to the above mentioned higher offer or the fair market value of said land; (2) that the defendants Pollin and Riggs Park Land Co., Inc., prior to execution of sales contract agreed to reimburse the defendant brokers Mensh and Plunkert and pay them an additional sum equal to 1% of the purchase price; and (3) that the defendant Lawyers Title Insurance Corporation and its title officer Frank W. Marsalek (who examined the title to the property in connection with the

sale) promised to notify plaintiff in advance of settlement of their proposed findings with respect to the necessity or lack of necessity of court approval of the sale so that plaintiff would have an opportunity to file suit to prevent the sale, and that said promise was made fraudulently without intent to keep it and that it was not kept.

Relief sought

Plaintiff prays that the transaction be set aside and the deed rescinded and the property reconveyed; that the court appoint trustees to receive from the defendants Emilie K. Bucy and Henrietta K. Evans, as trustees of the Kolipinski trust, the proceeds of sale, and pay out of said proceeds the Perpetual Building Association's loan and obtain a release of the deed of trust, as well as pay from said proceeds damages, attorneys' fees and costs, and pay the balance, if any, to Riggs Park Land Co., Inc. Plaintiff also asks judgment for \$10,000 against the defendant attorneys Burke, Doyle, and Charles W. Bucy.

Count Two

Counsel for plaintiff has abandoned, in open court, Count # 2.

Count Three

Plaintiff's charges are substantially identical with those in Count One.

589 *Relief sought*

Plaintiff asks judgment in the amount of \$410,000 against the defendants Pollin, Riggs Park Land Co., Inc., Doyle, Burke, Charles W. Bucy, Mensh, Plunkert, Marsalek, Lawyers Title Insurance Corporation, Emilie K. Bucy, and Henrietta K. Evans.

Count Four

Plaintiff charges that defendants Pollin, Riggs Park Land Co., Mensh and Plunkert, without the knowledge and consent of Bucy and Evans, trustees, paid a secret profit in the amount of \$10,000 to Burke, Doyle and Charles W. Bucy to induce them to influence the said trustees to sell the said land at less than the market value and \$67,158 less than a cash offer which had been received.

Relief Sought

Plaintiff asks judgment in the amount of \$10,000 against the defendant attorneys Burke, Doyle and Charles W. Bucy.

Counsel for trustees and for attorneys, Burke, Doyle and Charles W. Bucy, contend that plaintiff is not entitled to jury trial as demanded in Counts 3 and 4.

Amendment to Count One of the Complaint

Plaintiff adds as parties defendant Mary E. Spinks, Plunkert and Maddock, Inc., a corporation, and C. M. Plunkert and Company. He charges that the new defendants, or one of them, by deed recorded December 13, 1950, conveyed to defendant Riggs Park Land Co., Inc., part of Parcel 137/2 in the District of Columbia, adjacent to the property purchased by the defendant Riggs Park Land Co., Inc., from the Kolipinski trust; and that by two deeds recorded December 13, 1950, the defendant Riggs Park Land Co., Inc., conveyed to the defendant Mary E. Spinks, acting as a straw or dummy for the defendant Plunkert, part of Parcel 137/7; that on December 13, 1950, the defendant Perpetual Building Association released to the defendant Riggs Park Land Co. Inc., Parcel 137/7 from its loan and accepted as substitute and additional security Parcel 137/2; that at the time of these

new conveyances the defendants Plunkert, Plunkert and Company and Plunkert and Maddock, Inc., Mary E. Spinks, the defendants Pollin and the defendant Riggs Park Land Co., Inc., knew that plaintiffs' complaint was about to be filed, and that the purpose of said conveyances was to hinder, delay and defraud the plaintiffs in the prosecution of this action and to further the
 590 conspiracy charged in the complaint; that all of the defendants knew Mary E. Spinks to be a straw man for the defendant Plunkert; and that the defendant Pollin and the defendant Riggs Park Land Co., Inc., had agreed with the defendant Plunkert prior to April 24, 1950, to make the conveyances referred to in the amended complaint as additional compensation and reward for services of Plunkert in connection with the procurement of the contract of sale described in the original complaint. Plaintiff further alleges that the grounds and basis for the complaint were first discovered in early September 1950; that his resulting investigation and inquiry by David F. Smith required an additional eight weeks, and that he had attempted without success to get at least twenty members of the bar to proceed with the complaint. He also alleges that the defendants Pollin and Riggs Park Land Co., Inc., have known since September 15, 1950, that this action would be filed.

Relief sought

Plaintiff seeks a judgment setting aside the conveyances out of parcel 137/7 referred to in the amended complaint and a judgment against the defendants Mensh and Plunkert for all commissions received from the trustees of the Kolipinski trust and all compensation and other things of value received from the defendants Pollin and Riggs Park Land Co., Inc., in connection with the sale of said trust property. Plaintiff also seeks judgment against all of the defendants who participated in said breach of trust

for "the full damages sustained by the trust estate and the remaindermen under the will of Louis Kolipinski, deceased, said judgment to be to the use of the corpus of said estate."

Statement of Defendants' Claims

All defendants have answered the complaint and the amendment to the complaint. All of the defendants deny the authority or right of David F. Smith to file and represent the four infant plaintiffs as guardian ad litem or next friend, and his right to bring this suit as a class action.

All of the defendants admit the sale referred to in the complaint from the defendants Emilie K. Bucy and Henrietta K. Evans, trustees under the Kolipinski trust, to the defendant Riggs Park Land Co., Inc., for the price of approximately \$574,000, and admit the placing
591 of a deed of trust upon said property by the purchasing defendant Riggs Park Land Co., Inc., at the time of settlement of the sale running to the defendants Crowell and Scrivener, as trustees, securing a loan from the defendant Perpetual Building Association in the amount of \$373,435.52.

All of the defendants (except the defendants Perpetual Building Association and Crowell and Scrivener, as trustees, who state they are without knowledge) deny that court approval or ratification of the sale was necessary and admit that such court approval and ratification was not procured by the defendant trustees of the Kolipinski trust. The defendant Pollin, Riggs Park Land Co., Inc., Emilie K. Bucy and Henrietta K. Evans, trustees and the defendants Burke, Doyle and Charles W. Bucy, aver that under the trust created by the will of Louis Kolipinski, deceased, the defendant trustees had power and authority to sell and convey real property without court ap-

proval or ratification in cases where the sale was for more than two and one-half times the assessed value of said property, and that this sale was for more than two and one-half times the property's assessed value.

All of the defendants (except the defendants Perpetual Building Association, Crowell and Scrivener, who say they are without knowledge) deny any conspiracy as alleged in the complaint and amended complaint, and deny that said property was sold for less than its fair market value and deny that any offer was made to the trustees of the Kolipinski trust prior to the sale of the property for \$67,158 more, or any other sum. The defendant Title Company and Marsalek, the defendant attorneys Burke, Doyle and Charles W. Bucy, the defendants Mensh and Plunkert and the defendants Evans and Emilie K. Bucy, trustees, admit that out of the real estate brokers' commission for the sale of the property there was paid the sum of \$10,000 to the defendant attorneys Burke, Doyle and Charles W. Bucy, but aver that said payment was made with the knowledge, consent and approval of the defendants Emilie K. Bucy and Henrietta K. Evans. The defendants Emilie K. Bucy and Henrietta K. Evans, trustees, aver that said payment was made to save the trust estate attorneys' fees. The remaining defendants either deny the allegation or payment of said \$10,000 as a part of the alleged conspiracy or state that they are without knowledge of said payment.

592 All defendants either deny or say they are without knowledge of plaintiff's contention that the defendants Pollin and Riggs Park Land Co. Inc. agreed to reimburse the defendant brokers Mensh and Plunkert for said \$10,000 payment and to pay them an additional sum equal to 1% of the purchase price.

All of the defendants deny or say they are without knowledge of plaintiff's allegations that the defendant

Lawyers Title Insurance Corporation and its title officer Frank W. Marsalek promised to notify plaintiff in advance of settlement of the title company's proposed findings with respect to the necessity or lack of necessity of court approval of the sale.

The defendants Riggs Park Land Co. Inc. asserts that plaintiff's right of action is barred by laches.

All of the defendanst aver that defendants Mensh and Plunkert were agents of the trustees and not of any of the purchasers.

Count Two

Count 2 is dropped.

Count Three

Defendants assert the same defenses as to Count One.

Count Four

All of the defendants deny the allegations of Count Four or state they are without knowledge.

The defendant attorneys Burke, Doyle and Charles W. Bucy, and the defendant trustees Evans and Emilie K. Bucy also aver that the payment of \$10,000 referred to was made to the defendant attorneys with the knowledge and consent of the defendant trustees from the commission which was received by Mensh and Plunkert and was in lieu of any attorney's fee which said defendant attorneys might otherwise claim against the estate for handling the negotiations respecting the sale, that said payment was an advantage to the estate for that reason, and that neither the estate nor the interest of the remaindermen was damaged thereby.

Defendants, embracing two trustees, Mrs. Bucy and Mrs. Evans, under the will of Kolipinski and as indi-

viduals, and attorneys Bucy, Burke and Doyle, deny plaintiff is entitled to jury trial under Counts 3 and 4.

593 *Statement of Defendants' Answer to the
Amendment to Plaintiff's Complaint*

Defendants Plunkert, C. M. Plunkert & Company, Spinks, Riggs Park Land Co. Inc. and the defendants Pollin admit that by a deed recorded December 13, 1950, defendant Spinks conveyed to defendant Riggs Park Land Co. Inc. part of Parcel 137/2 and that by two deeds recorded December 13, 1950, defendant Riggs Park Land Co. Inc. conveyed to defendant Spinks part of Parcel 137/7, and deny that defendant Spinks was a straw or dummy for the said defendant Plunkert. These defendants, as well as defendants Lawyers Title Insurance Corporation, Marsalek, Perpetual Building Association, Scrivener and Crowell, admit that on December 13, 1950, defendant Perpetual Building Association released to defendant Riggs Park Land Co. Inc. part of Parcel 137/7 and accepted as additional or substituted security for its loan part of Parcel 137/2. All of the defendants deny that they knew that plaintiff was about to file this complaint at the time said deeds were recorded, and further deny that the purpose of said conveyances was to hinder, delay or defraud the plaintiffs in the prosecution of this action, and deny that these conveyances were in furtherance of any conspiracy. Defendants Riggs Park Land Co., Inc., Plunkert, Plunkert & Company, Spinks, Evans and Bucy, trustees, and the defendants Pollin deny that the said conveyances were for additional compensation for services rendered by defendant Plunkert in connection with the procurement of the contract of sale described in the original complaint, and further deny that there was any agreement for such additional compensation. All of the defendants deny that they have known since September 15, 1950, that this action would be filed.

STIPULATIONS:

All of the documents presented by respective counsel and agreed to and bearing the initials of the Court will be received without formal proof subject to the test of relevancy and materiality. For more specific description of the documents and other actions of the Pretrial Court see court reporter's transcript of Jan. 22, 1951.

DATE January 22 ,1951

/s/ R. B. Keech
Pretrial Judge

* * * *

598 Filed Feb 8 1951 Harry M. Hull, Clerk

**Verdict, Findings of Fact and
Conclusions of Law**

This Action came on to be tried upon the facts on the 31st day of January, 1951, *Count One* being tried before the Court without a Jury, and *Counts Three* and *Four* being tried before the Court and a Jury of good and lawful persons of this district, to-wit:

* * * *

Said jurors after having been duly sworn to well and truly try the issues between Joan C. Smith, et al., plaintiffs, and Morris Pollin, et al, defendants, and after this Action was heard, and on the 5th day of February, 1951, by direction of the Court, having found for the defendants against the plaintiffs on *Counts Three* and *Four* of the Complaint; whereupon, the Court, having considered the testimony adduced under *Count One* of the Complaint, does hereby make and enter the following

Findings of Fact

1. Plaintiffs are grandchildren of Louis Kolipinski, deceased, (hereinafter called the testator) who died
599 domiciled in the District of Columbia on December 15, 1914. The testator's last will and testament, dated November 2, 1910, was duly admitted to probate and record in this Court. By said will the testator left his residuary estate, including the property involved in this Action, to his wife, Ella M. Kolipinski, as Trustee, in trust, until the death of his wife and children, provided that if the testator's wife should marry again after his death and his two oldest living children should have arrived (or should thereafter arrive) at their majority, the said two oldest children were "appointed trustees with the same authority and power as herein given and granted" unto the testator's said wife as Trustee.

2. On August 15, 1918, Ella M. Kolipinski, then the widow of the testator, married Louis F. C. Ockershausen.

3. The two oldest living children of the testator are the defendants Emilie K. Bucy and Henrietta K. Evans, the younger of whom attained her majority on September 17, 1925, and who, at the time of the sale hereafter referred to, were acting as successor trustees under the will of the testator.

4. The will of the testator contained the following authorization to his trustee and successor trustees for sale of real estate belonging to the testator's estate:

"For the purpose of carrying out the full provisions of this my last will, it is my intentions that my real estate shall be preserved as a whole for the benefit, support and maintenance of my said wife Ella M. and my children during their lives; but occasions may arise when a part or the whole of my real estate may be sold at a great advantage. I therefore authorize and empower my said trustee to sell any part, or the whole of my said

real estate at any time for a sum not less than two (2) and one (1) half ($\frac{1}{2}$) times the then assessed value of my said real estate and to transfer and convey to the purchaser or purchasers a perfect title. But my said trustee is not authorized to Mortgage any part of my real estate for any purpose."

600 5. At the time of the institution of this Action there were and now are four living children of the testator, to-wit, the defendant Emilie K. Bucy, the defendant Henrietta K. Evans, Louis X. Kolipinski and Eleanor Kolipinski Smith. Said children of the testator have in the aggregate eleven living children of their own, of whom all but one are minors. The four minor plaintiffs are children of Eleanore Kolipinski Smith and David F. Smith, the latter of whom has brought this action as their "next friend." Said David F. Smith was divorced from Eleanore Kolipinski Smith by this Court on April 28, 1941, and the permanent custody of the four minor plaintiffs in this action was awarded to and now reposes in their mother, the said Eleanore Kolipinski Smith, with whom they now reside.

6. At all times since the death of the testator and until April 21, 1950, the trust estate of the testator included an undeveloped tract of land of approximately 82 acres, located in the Northeast section of Washington, D. C., known for purposes of assessment and taxation as Parcels 137/6, 137/7, 137/14, 137/15 and 137/27, said property for convenience being hereafter called the Kolipinski tract.

7. On April 21, 1950, the said Kolipinski tract had an assessed value of \$120,167.00.

8. On April 21, 1950, the defendants Emilie K. Bucy and Henrietta K. Evans, as successor under the will of the testator, entered into a written contract with the defendants Morris Pollin and Dan Pollin for the sale of

said Kolipinski tract to said defendants Morris Pollin and Dan Pollin for the price of \$7,000 per acre, all cash, settlement to be made within ninety days from April 21, 1950. A deposit of \$50,000 was made by the defendant purchasers to the said trustees under said contract of sale. Said contract of sale was also approved in
601 writing by the two other children of the testator, Louis X. Kolipinski and Eleanore Kolipinski Smith.

9. The aforesaid contract of sale was procured by the defendants Sidney Z. Mensh and Charles M. Plunkert, licensed real estate brokers in the District of Columbia, to whom, for their services, said trustees agreed in the written contract of sale to pay a real estate brokers' commission amounting to 5% of the sales price. Shortly prior to the execution of said contract of sale the defendant trustees, Emilie K. Bucy and Henrietta K. Evans, insisted to the defendants Michael M. Doyle and Thomas F. Burke (who with the defendant Charles W. Bucy were acting as attorneys for said trustees in the matter of said sale) that the fees of their attorneys be paid out of the brokers' commission. This was done by the said trustees in order to save money to the trust estate. Thereupon, and simultaneously with the execution of said sales contract, the defendants Mensh and Plunkert, in the presence of said trustees and with their knowledge, insistence and approval, executed a written agreement to pay out of their sales' commission the fees of said trustees' attorneys aggregating \$10,000.

10. Prior to the execution of the aforesaid contract of sale, and in order to procure an offer from the defendants Morris Pollin and Dan Pollin, the defendant Mensh obtained from the defendant Perpetual Building Association a commitment to make a first deed of trust loan to be secured on said Kolipinski tract in an amount not exceeding \$400,000, the notes evidencing said loan to be endorsed personally by the defendants Morris Pollin

and Dan Pollin. The defendant Mensh received no commission or other compensation from said defendants Pollin for obtaining such commitment.

602 11. Pursuant to the provisions of the aforesaid contract of sale, the defendant Plunkert ordered an examination of title on the Kolipinski tract from the defendant Lawyers Title Insurance Corporation. Said Title Company proceeded to examine the title to said land, and upon completion of its examination prepared a proposed deed for the conveyance of said property to the defendant Riggs Park Land Co. Inc. (which had been organized by the defendants Pollin on June 30, 1950). Shortly prior to July 14, 1950, the defendants Mensh and Plunkert drove to New York State to expedite the execution and delivery of said deed by the defendant trustee Henrietta K. Evans, to whom the deed had been mailed by her attorney, and who executed and acknowledged the deed in New York State, in order that settlement under said contract might be made within the ninety day period prescribed therein.

12. Settlement under the aforesaid contract of sale was made at the offices of the defendant Lawyers Title Insurance Corporation on July 14, 1950, at which time the deed of conveyance was executed by Emilie K. Bucy, trustee, and delivered to the defendant Riggs Park Land Co. Inc., as nominee of the defendants Morris Pollin and Dan Pollin, and the full cash purchase price of \$573,435.52 was paid for the property.

13. At the time of settlement under said contract the defendant Riggs Park Land Co. Inc. executed and delivered a deed of trust upon said property running to the defendants Junior F. Crowell and Samuel Scrivener, Jr. as trustees to secure a loan made to Riggs Park Land Co. Inc. by the defendant Perpetual Building Association in the amount of \$373,435. Out of the proceeds of sale and pursuant to written instructions given to the Title

Company by the brokers, the defendant Title Company paid to the defendants Doyle, Burke and Bucy the
 603 aggregate sum of \$10,000, which sum was charged against the real estate commission of the defendants Mensh and Plunkert.

14. The deed of conveyance for the aforesaid Kolipinski tract from the defendants Emilie K. Bucy and Henrietta K. Evans, trustees, to the defendant Riggs Park Land Co. Inc. was duly recorded among the land records of the District of Columbia on July 17, 1950, at 2:04 P.M. in Liber 9250 at folio 473, and the deed of trust from Riggs Park Land Co. Inc. to the defendants Junior F. Crowell and Samuel Scrivener, Jr., as trustees, was duly recorded among the said land records on July 17, 1950, at 2:04 P.M. in Liber 9250 at folio 480.

~~15. The defendants Morris Pollin, Dan Pollin, Jack Pollin and Abe Pollin and the Riggs Park Land Co. Inc. did not, nor did any of them, agree to reimburse the defendants Mensh and Plunkert for payment of said \$10,000, nor did they agree to pay to said defendants Mensh and Plunkert any compensation in connection with said sales contract.~~

There is no evidence that at any

16. ~~At no~~ time prior to the execution by the defendant trustees of the aforesaid contract of sale for said Kolipinski tract, or the delivery of the deed of conveyance pursuant to said contract, was any offer made for the purchase of said land at a price \$67,158 higher than the
 or

Pollin offer, ~~nor was~~ any other higher price offered than the price for which the property was sold.

17. The defendants did not, nor did any of them, conspire to sell the aforesaid Kolipinski tract at a price less than the best price obtainable or less than the fair market value of said land, nor did any of said defendants prac-

tice any fraud or deceit in connection with the sale of the said land.

The sale of said tract was not made at an unreasonably low price.

18. ~~On April 21, 1950, the fair cash market value of said Kolipinski tract was not in excess of \$7,000 an~~
604 ~~acre, and the defendant trustees of the Kolipinski trust did not abuse their discretion in selling said tract of land for said price.~~

Based upon the foregoing Findings of Fact, the Court hereby makes and enters the following

Conclusions of Law

1. The defendants Emilie K. Bucy and Henrietta K. Evans are the successor trustees under the last will and testament of Louis Kolipinski, deceased, acting as such pursuant to the terms of said will itself, and as such successor trustees were and are clothed with all of the authority, power and discretion granted by the testator in said will to his wife, Ella M. Kolipinski, original trustee thereunder.

2. As successor trustees under the last will and testament of Louis Kolipinski, deceased, the defendants Emilie K. Bucy and Henrietta K. Evans had full power and authority in their discretion, and without the necessity of any approval or ratification by this Court, to sell the Kolipinski tract of land involved in this action for the sum of \$573,435.52, all cash, (said sum being more than 2½ times the then assessed value of said real estate) and to transfer and convey to Riggs Park Land Co. Inc., as nominee of the purchasers thereof, a perfect fee simple title.

3. The payment by the defendants Sidney Z. Mensh and Charles M. Plunkert of the sum of \$10,000 as attorneys'

fees out of their commissions as real estate brokers in the above mentioned sale to the defendants Michael M. Doyle, Thomas F. Burke and Charles W. Bucy, who acted as attorneys for the defendant trustees in connection
 605 with said sale, was not fraudulent or in any manner improper, said payment having been made with the knowledge, insistence and approval of said defendant trustees, and having resulted in a saving to the trust estate of attorneys' fees which would otherwise have been properly chargeable against said trust estate.

4. The defendant trustees acted within their sound discretion as trustees in the aforesaid sale of said Kolipinski tract and did not in any manner abuse such discretion.

Judgment rescinding

5. The plaintiffs are not entitled to ~~rescind~~ the deed of conveyance from Emilie K. Bucy and Henrietta K. Evans, trustees, to Riggs Park Land Co. Inc., dated July
 setting
 12, 1950, or ~~to set~~ aside said sale.

6. All of the prayers of *Count One* of the plaintiffs' complaint should be denied and said complaint dismissed.

/s/ Alexander Holtzoff
 Judge

February 8, 1951.

• • • •

606 Filed Feb 8 1951 Harry M. Hull, Clerk

Judgment

Upon consideration of the verdict entered by the Jury under direction of the Court with respect to *Counts Three* and *Four* of plaintiffs' complaint, and *Count Two* of said complaint having been withdrawn by plaintiffs at pre-trial, and the Court having made and entered its Find-

ings of Fact and Conclusions of Law with respect to *Count One* of the complaint, it is this 8 day of February, 1951.

* * * *

ADJUDGED:

1. That plaintiffs take nothing by this action and that the defendants go hence without day and be for nothing held.

2. That plaintiffs' complaint be and the same is hereby dismissed.

3. That the defendants recover of David F. Smith, next friend of the plaintiffs, their costs in this action.

/s/ Alexander Holtzoff
Judge

* * * *

412G I will hear your objections, if you have any, or any suggestions as to the proposed findings and conclusions of law.

MR. SMITH: If your Honor please, the proposed findings go way beyond anything that your Honor indicated in disposing of this case.

THE COURT: Well, suppose we go down one by one, and you state what your objections are.

* * * *

MR. SMITH: If your Honor will go down to paragraph 9, there is no evidence in the record that Mensh and Plunkert were acting as agents for the Kolipinski trustees.

MR. CAMPBELL: That appears, if your Honor please, from the sales contract itself, and from the authorization cards.

412I MR. SMITH: All the evidence showed fraud on the part of both brokers.

THE COURT: I do not think it is necessary for the Court to make a finding as to whom Mensh and Plunkert represented. And I must say that to me they were acting more as agents for the Pollins than for the Kolipinski estate, because they first obtained an offer from the Pollins and then they came to the Kolipinski trustees and asked for that offer to be accepted.

Of course, brokers do that time and again, and the practice of real estate brokers seems to condone that sort of thing. I always wondered as to the propriety of that type of practice. Certainly I am not going to make a finding that they were not the agents of the Kolipinski trustees.

I am going to strike out the words "who were authorized in writing by the Kolipinski trustees as their agents to offer the Kolipinski tract for sale."

MR. OTTENBERG: Just striking out the words "as their agents."

THE COURT: I will leave the sentence this way: "The aforesaid contract of sale was procured by the defendants Sidney Z. Mensh and Charles M. Plunkert, licensed real estate brokers in the District of Columbia, to whom for their services said trustees agreed in the written contract of sale to pay a real estate broker's commission amounting to 5 per cent of the sales price."

412J Now, anything else, Mr. Smith?

MR. SMITH: Now, your Honor, in connection with that your Honor will recall under the first count that separately in the prayer for relief the judgment was asked against these brokers because they were working both sides of the street. They concealed the information—

THE COURT: What is your point?

MR. SMITH: Fraudulent conduct on the part of the brokers in the case.

THE COURT: I am only passing now on the formal findings. I have passed on the merits.

MR. SMITH: Well, your Honor, that was an issue in the equity count.

The brokers took an antagonistic position against the Kolipinski trustees, with the concealment of information from them.

THE COURT: I know, but what specific finding are you referring to now?

MR. SMITH: I am pointing more to the absence of any pertinent finding—

THE COURT: I am now considering any suggestions or objections that you have to the form of the proposed finding.

MR. SMITH: Will your Honor allow me to say that these proposed findings first came to my attention at 6 o'clock last night?

412K THE COURT: I think that is sufficient time.

* * * *

MR. SMITH: In paragraph 10 it says that Mensh received no commission or other compensation from the defendants Pollin for obtaining such commitment.

412L This is contrary to the evidence, but certainly permitted a contrary finding that they had an agreement of reimbursement to get 1 per cent additional commission from the Pollins, and when the Pollins did not pay, they told Mensh that they would give him an exclusive sale on the first hundred new houses they put up on this property.

THE COURT: Now, that last sentence of paragraph finding 10, which Mr. Smith refers to, Mr. Campbell, I do not recall any evidence one way or the other on the subject.

MR. CAMPBELL: Mr. Mensh testified that he received no compensation.

THE COURT: Is that relevant to the issues in this case? I do not want to make findings on matters that are not relevant.

MR. CAMPBELL: It is important on the question of whether the agents were receiving compensation from

both sides without the knowledge of both parties. That would be the only question.

THE COURT: I recall that Mensh said that. I will make that finding.

* * * *

412M MR. SMITH: Paragraph 16, Your Honor.

412N This proposed finding, in its entirety, has no support in the evidence and is contrary to all the evidence.

THE COURT: Well, it is not contrary to the evidence, certainly.

MR. SMITH: In any event, it was a jury question on the third count.

THE COURT: No. Is there any evidence that any other offer was made?

MR. SMITH: Yes, your Honor. There is the uncontradicted testimony of Mr. David Bress of this bar, and my testimony on the subject, regardless of the conduct of Mr. Shapiro himself on the stand. Mr. Irvin Goldstein also testified on the subject.

THE COURT: What did they testify to?

MR. SMITH: Well, Mr. David Bress, your Honor, gave uncontradicted evidence—was not asked a single question on cross-examination. He said he took Shapiro to lunch; Shapiro gave him his original notes on the transaction; and he confirmed the fact that he had offered \$7,700 an acre, all cash.

THE COURT: In the first place, I do not think that was the testimony.

As I remember Mr. Bress's testimony, Shapiro said to him that he would make that offer if the Pollin sale fell through.

But entirely aside from that, Mr. Smith, your testimony and Mr. Bress's testimony as to statements
4120 made by Shapiro were admissible in evidence for the purpose of impeaching the credibility of Shapiro.

They are not affirmative evidence in and of themselves, because they are hearsay for that purpose.

MR. SMITH: Your Honor, it was part of the *res gestae*.

THE COURT: No; that is not *res gestae*.

MR. SMITH: The Shapiro—

THE COURT: Now, I have ruled and I had this matter in mind when I admitted that testimony.

MR. SMITH: Well, your Honor, because of the conduct of Mr. Shapiro on the stand, the Court could very well find that the defendants tampered with him as a witness.

MR. OTTENBERG: Oh, now!

THE COURT: However, No. 16, I think, goes farther than the Court is willing to go.

I am willing to find that there is no evidence of any offer made.

I am not willing to make an affirmative finding.

MR. OTTENBERG: That is all right.

MR. CAMPBELL: Just at the very beginning, "There is no evidence that" would cover it.

THE COURT: "There is no evidence that at any time" instead of "at no time"; which is just a matter of grammar.

And then in the third line from the bottom of the finding, in order to correct the grammar, I am striking out "nor was" and substituting the word "or".

412P MR. CAMPBELL: Yes.

THE COURT: That is in line with my correction at the beginning of the paragraph.

* * * *

was called as a witness for and on behalf of the plaintiffs and, having been previously duly sworn, was examined and testified as follows:

Direct Examination

* * * *

109 Q And you had no conversation at all with either Morris Pollin or Dan Pollin about your giving up the \$10,000 out of commission? A We certainly mentioned it to them at the time that the contract was signed, that we had to give it up, certainly. And they knew all the phases of the deal.

Q Who did you mention it to? A To Morris and Dan. After the contract was signed. We delivered it to them that night, Mr. Plunkert and myself, and told them exactly what went on.

Q You mean on April 21, 1950, you talked to both Morris and Dan Pollin? A That evening.

Q And told them that you had to give up \$10,000 out of your commission; and what did they agree to do about it? A It didn't make much difference to them.

Q I asked you, Mr. Mensh, what they agreed, if anything, to do about it. A Nothing.

Q I ask you if on April 21, 1950, immediately before the agreement with the lawyers for the \$10,000 was signed, that you told Morris Pollin and Dan Pollin
110 that you couldn't get a contract without giving these three lawyers \$10,000? A I don't recall saying that particularly.

Q Do you deny that you made that statement to me in your office, in the early part of September, 1950? A Definitely.

Q And do you also deny that Morris Pollin and Dan Pollin agreed to reimburse you for that \$10,000? A Definitely.

Q And do you also deny that on the same place and same occasion, that you said that Morris Pollin and Dan Pollin would also pay you an additional commission of 1 per cent on the sale? A That is right.

Q They made no such agreement; is that right? A They made no such agreement.

* * * *

113 BY MR. SMITH:

Q I will ask you if when you presented the claim to Morris and Dan Pollin to be reimbursed with \$10,000, plus 1 per cent additional commission, that Morris and Dan Pollin told you to forget about the idea of suing them, and they would give you the exclusive sale of the first hundred houses they put up on this Kolipinski property?

MR. AMMERMAN: I object, if the Court please. The question is based on a false premise.

THE COURT: Objection sustained, because the question assumes a fact that is not in evidence.

MR. SMITH: I am asking him whether—

THE COURT: I know, but you are assuming a fact in the question.

Suppose you split your question up; reframe it.

* * * *

114 Q Did Morris and Dan Pollin ever tell you to forget about the idea of suing them? A I never sued them. I never intended to.

Q My question was, Mr. Mensh, whether either one of them, or both of them, told you to forget about suing them. A They never spoke to me along those lines.

Q Was anything ever said by Morris and Dan Pollin about giving you the exclusive sale of the first hundred houses that were built on this Kolipinski property? A That has nothing to do with this. I was the sales agent for them previously.

Q How many new houses would you say you have sold for Morris and Dan Pollin before April of 1950? A I had sold none for Dan Pollin. I had sold some for Morris Pollin. Under my own brokerage license, I would say about 50 houses for Morris Pollin.

Q You were their exclusive sales agent; is that right?

A That is right.

* * * *

147

Adlai Mann

was called as a witness for and on behalf of the Plaintiff and, having been first duly sworn, was examined and testified as follows:

Direct Examination

* * * *

153 Q Mr. Mann, could you narrow the conversation down as it relates to Mensh and Plunkert? A Yes. When I asked Mr. Pollin why these brokers were subsequently permitted to make the deal, he said that the reason that Mensh was brought in it was because in the first place they did a lot of business together, he was in his office in and out, he sold houses for them, and that he also had a commitment for a first trust loan which Pollin felt that he would require in order to swing the deal, and that was his justification for bringing in Mensh.

His justification for bringing in Plunkert was that Plunkert represented himself as being very close to the sellers, and that he had information with relation to the sale of other property adjacent which, if disclosed to the sellers, might perhaps influence the deal adversely.

154 Q Was anything said in that conversation by Morris Pollin that Charles Plunkert told him that if he wasn't brought into the deal, that he, Plunkert, was going to tell the trustees of the Kolipinski estate that Dan Pollin had paid \$10,000 an acre for the land next to the Kolipinski property? A Yes.

MR. CAMPBELL: Objection to the question, if the Court please.

THE COURT: Objection overruled.

What was your answer?

THE WITNESS: Yes.

* * * *

165

H. Max Ammerman

was called as a witness for and on behalf of the plaintiffs and, having been first duly sworn, was examined and testified as follows:

Direct Examination

BY MR. SMITH:

Q Will you state your full name, please, sir? A H. M. Ammerman.

THE COURT: State your full name.

THE WITNESS: H. Max Ammerman.

116

BY MR. SMITH:

Q You have been a member of the bar of the District of Columbia for how many years? A Over eighteen.

Q Your office for some years has been with Mr. Louis Ottenberg, an attorney? A That is correct.

Q Mr. Ottenberg was representing Morris and Dan Pollin in June of 1950; is that right? A I believe so. You mean in connection with this deal? I think they were in for a conference. I don't know whether it was June, but it was some time in 1950.

Q Some time before the settlement of the Kolipinski sale at Lawyers Title Insurance Company? A That is right.

Q How long have you been attorney for Sidney Z. Mensh, a real estate dealer? A I was attorney for Mr. Mensh in—

THE COURT: Just answer the question briefly. How long?

THE WITNESS. I cannot say what period of time. I have represented—

BY MR. SMITH:

Q Just roughly. A I represented him in a couple of matters prior to the time we both went into the
167 service, and I represented him in one or two matters since.

Q Now, when the Kolipinski sale was settled at the Lawyers Title Insurance Company on July 14, 1950, did you attend the actual settlement of the sale? A I attended the settlement; yes, sir.

Q And who was present at that time? A Dan Pollin, Morris Pollin, Sidney Mensh, Mr. Plunkert, Mrs. Bucy, Mr. Bucy, Judge Doyle, Mr. Burke, the settlement clerk, of course; I believe Mrs. Bucy had her daughter there.

That is as many as I recall at the moment.

Q Who were you representing at the settlement of the sale? A At that settlement I was representing the Pollins in the absence of Mr. Ottenberg and Mr. Shelton, who were out of the city.

Q After the settlement and the deed went on record, did Sidney Z. Mensh come over to your office and consult you about filing a lawsuit against Morris and Dan Pollin? A He did not.

Q Did you have a conversation with Mr. Mensh at any time or any place with respect to a claim against Morris or Dan Pollin, for \$10,000, plus 1 per cent commission of the sale price of the Kolipinski property? A I had a conversation with Mr. Mensh in my office. Mr. Mensh comes by frequently. It was more as a friendly
168 conversation. I congratulated him on making the deal. I knew there was a nice commission involved in it for him. He discussed the commission with me; the fact that they had started off hoping to get 10 per cent—

THE COURT: Now, I suggest that you confine your answer to the part of the conversation which took place concerning the question.

THE WITNESS: I am getting down to it, your Honor.

He discussed the fact that finally they hoped to get 6 per cent, and then got 5 per cent and had to pay the \$10,000, which, as he indicated here, he did not like, but had to do it.

BY MR. SMITH:

Q He said he didn't like it, but had to do it; is that what you said? A He said he didn't like to lose the \$10,000, but he was satisfied with the commission he was getting out of it. It was still some, I think, \$18,000 commission.

Q Well, did he consult you about getting back his \$10,000 and 1 per cent commission? A He did not.

Q You mean there was nothing said about that subject at all? A He said nothing to me about getting back the \$10,000 or 1 per cent. It wasn't in his mind, I could gather, from any of the conversation we had.

169 Q How did the subject come up that he had had to give up \$10,000 out of his commission? A He mentioned to me that when he had this conversation, the same as he related on the witness stand, with Judge Doyle, in his office, that the trustees had said that they wanted the deal net, and they wouldn't pay attorneys' fees and wanted the attorneys to make their fees out of the commission. And he said, after some talk about it back and forth, he had consented to it, he and Mr. Plunkert.

Q Now, during that conversation didn't you tell Sidney Z. Mensh that you couldn't handle a matter against Morris and Dan Pollin because you were in the office with Mr. Ottenberg, who represented the Pollins? A There was nothing discussed about handling any matter against anyone for Mr. Mensh.

Q Now, as a matter of fact, Mr. Ammerman, didn't you tell Sidney Mensh that you couldn't handle the matter but you would go outside and try to get some other Washington lawyer to handle the matter against the Pollins? A No, sir; that is not correct.

Q I want to ask you, Mr. Ammerman, if you didn't meet Mr. Arthur J. Hilland, a prominent member of the Washington bar, in the downtown section here near the Court House, in the latter part of August of 1950, and discuss the Mensh matter with him?

170 MR. CAMPBELL: Objection, your Honor. I think that is getting rather far afield.

THE COURT: Objection sustained. I think that under the rules this leeway is permissible.

I am referring to Rule 43(b) of the Federal Rules of Civil Procedure.

BY MR. SMITH:

Q Did you talk to Mr. Arthur J. Hilland in order to—

THE COURT: Just a moment. I want to say on the information of my ruling, while Rule 43(b) relates to adverse parties, this witness counseled for an adverse party, and I think in spirit the rule should apply.

MR. AMMERMAN: May I say, sir,—

THE COURT: No. You may continue, Mr. Smith.

BY MR. SMITH:

Q Did you talk to Mr. Arthur J. Hilland about his representing Sidney Mensh in a claim against Pollin? A I spoke with Mr. Hilland in the Municipal Court Building following a motion he and I had, as opposing attorneys in a case. I was not—I did not speak to him as Mr. Mensh's attorney at the time. I had heard that Mr. Hilland was interested in the case in your behalf, Mr. Smith, and because of that and because I had heard of his interest in the case, I spoke to him as attorneys would do.

At that time the only question I had heard that
171 you were raising was something about this \$10,000 payment. I explained to Mr. Hilland what Mr. Mensh had told me with respect to the commission, how it had been whittled down from 10 to 7-1/2, to 6, to 5, and the \$10,000 payment. That was the extent of my conversation with Mr. Hilland.

Q Well, suppose you give us all of the conversation with Mr. Hilland from first to last on that occasion. A I think I have covered it, sir. This conversation was four or five months ago, of a few minutes' duration.

THE COURT: Well, you have covered it.

THE WITNESS: Yes, sir.

BY MR. SMITH:

Q How did you hear about the fact that I knew about the \$10,000? A I think Mr. Mensh told me that you had consulted with Mr. Hilland. That is what prompted my conversation with Mr. Hilland when I saw him that day.

Q I will ask you, Mr. Ammerman, if you didn't tell Mr. Hilland that you could not represent Mensh in a suit against the Pollins for the \$10,000, plus the 1 per cent commission, because you were in the office with Mr. Ottenberg, and that you had told Mr. Mensh that you would try to find some other lawyer, and you wanted him, Hilland, to represent Mensh in that claim? A That is not correct, sir.

172 Q Did you tell Mr. Hilland that the three lawyers for the trustees of the Kolipinski estate had gotten \$10,000 out of Mensh's commission? A Yes, I told him what took place at the title company.

Q Did you also tell him something about 1 per cent additional commission? A Only the reduction from 6 to 5 per cent.

Q Did you also tell Mr. Hilland that the Pollins had pulled a dirty trick on Mensh? A I never used any such expression.

Q Well, what did you say about that? A Just as I have indicated. I simply told him that there was some talk about the \$10,000 payment, and just as I indicated before, I told him what Mensh had told me with respect to the commission.

Q And your testimony is that you never asked Mr. Hilland at any time to represent Mensh? A That is

correct. I had no occasion to. There wasn't any suit contemplated. Mr. Mensh never broached the subject to me and it had not occurred to me.

Q Mr. Ammerman, isn't it a fact that as soon as you brought up the subject of the \$10,000, that Mr. Hilland warned you that I had already consulted him about this case? A No, sir. I knew you had consulted him before

I spoke to Mr. Hilland, and that was the reason for
173 the conversation I had with him.

Q Now, how did you find out that I had consulted Mr. Hilland? A My best recollection is that Mr. Mensh told me. He had already heard it from you.

I might say I heard from several attorneys that you had consulted over a period of time.

I don't know just where he fitted in the picture.

Q Will you give me the names of the other attorneys that you heard that from?

THE COURT: I think that is going too far afield.

MR. SMITH: Well, your Honor, I am going to call a witness this morning that is going to impeach this witness. And I am going to attempt to impeach this witness and also the witness Mensh.

Mr. Hilland will be here at eleven o'clock this morning.

THE COURT: Now, these are adverse witnesses. You have a right to offer testimony to contradict anything that is testified to by an adverse witness, but the questions that you are now propounding to the witness are beyond the issues of this case.

BY MR. SMITH:

Q Mr. Ammerman, have you told us all you know about the \$10,000 payment out of the commission? A I know that the settlement at the title company—

THE COURT: No. The question calls for a
174 yes or no answer.

THE WITNESS: No.

BY MR. SMITH:

Q What is the rest of the story? A At the title company at the settlement, in the presence of the settlement clerk, I think it was Mr. Marsalek, and all the other people I mentioned, the subject was brought up, the letter was produced pertaining to the \$10,000 in the presence of everyone.

MR. SMITH: You may cross-examine.

THE COURT: Is there any cross-examination?

MR. OTTENBERG: No, sir.

* * * *

185

Arthur J. Hilland

was called a witness for and on behalf of the plaintiffs and, having been first duly sworn, was examined and testified as follows:

* * * *

190 MR. SMITH: Your Honor, I would like to make a proffer.

THE COURT: You may come to the bench and make your proffer.

(Counsel for both sides approached the bench and conferred with the Court, in a low tone of voice, as follows:)

THE COURT: You may proceed.

MR. SMITH: This witness here, had he been permitted to, would have testified that Mr. Ammerman approached him in the Municipal Court—

THE COURT: I suggest you talk in a somewhat lower tone.

MR. SMITH: That is precisely why I asked your Honor if it would not be well to send the jury out. I have got a heavy voice, and it is almost impossible for me to whisper.

THE COURT: No, I am not going to send the jury out.

Do your best.

MR. SMITH: If this witness had been permitted to testify, he would have testified that Mr. H. Max Ammerman approached him in the Municipal Court of the District of Columbia in the latter part of August 1950, and asked him if he could represent—

MR. MICKLER (interposing): Your Honor, I can stand by the jury and hear him.

191 THE COURT: Do not interrupt.

MR. DOYLE: What about Mr. Smith writing it down? It will save time.

THE COURT: No. Proceed.

MR. SMITH (continuing): —Asked him if he could undertake employment and represent Sidney Z. Mensh in a lawsuit against Morris and Dan Pollin to recover from them the \$10,000 paid out of his commission in connection with the sale of this property, and also 1 per cent additional commission which Ammerman told him that Morris and Dan Pollin had agreed to pay before this contract of sale was drawn, and that at the beginning of that conversation Mr. Hilland warned Mr. Ammerman that he had already talked to me about this matter and he thought it would be inconsistent for him to represent both me and Mr. Mensh in this matter, and that notwithstanding that, Mr. Ammerman went on and told him all the facts in connection with the claim.

In that connection, Mr. Ammerman stated that he was in the office with Mr. Louis Ottenberg, who represented the Pollins, and for that reason he could not handle the matter and was trying to find some other attorney to handle the case.

That is the extent of the proffer.

THE COURT: I will exclude the evidence.

• • • •

the plaintiff, took the stand in his own behalf, and, having been first duly sworn, testified as follows:

* * * *

265 THE WITNESS: And as a result of that, I went over to 1527 I Street, Northwest, and with-
out any previous appointment walked in the office of Mr. Sidney Z. Mensh, a defendant in this case.

Mr Mensh had a very small office. There were one or two people sitting up in the front, and he was in a small office—

THE COURT: Now, when was that, approximately, Mr. Smith?

THE WITNESS: Your Honor, that was about the 5th or 6th of September, 1950.

THE COURT: Proceed.

THE WITNESS: And I told him right off the bat, I said, "I know that you gave up \$10,000 out of your commission to the three lawyers in this Kolipinski estate."

I said, "I am looking out for the interests of my children," and I said, "I would appreciate your frankness in telling me how it came about."

And he says, "Well, I would certainly"—

Mr. Campbell. I would like to know the purpose of this testimony. Is this for the purpose of impeachment also?

THE COURT: Well, I think this is admissible. I am going to allow this testimony.

Apparently he seeks to contradict the witness Mensh by a contradictory statement alleged to have been made by him.

You may proceed.

266 THE WITNESS: So Mensh said, he said, "I would certainly like to know how you found that out." And he looked plenty surprised about it.

And I said, "Well, Mr. Mensh, I will tell you later how I found out about it."

I said, "There is going to be a lawsuit filed in this case," and I said, "You are going to be a witness."

I said, "I would like to tell you later how I found out about it."

I said, "I would appreciate it if you told me all the facts, how it came about."

So then he opened up and he talked very freely. He said he spent a lot of time trying to buy this property; that he had known the Pollins for some time; and he said he had gotten financing for them so that the Pollins could handle the deal. He said when he first saw Judge Doyle about it, that he asked for ten per cent commission, which sounded fantastic to me. I never heard of such a rate of commission.

THE COURT: I am going to strike out that statement. I do not think you should characterize anything. Just confine your testimony to what was said.

THE WITNESS: Well, your Honor, I am perfectly willing that that be stricken out.

MR. OTTENBERG: You should not have said it in the first place.

THE COURT: Proceed.

267 THE WITNESS: He said Judge Doyle, a few days after that, told him that the trustees were not willing to pay any more than five per cent commission.

He said then he held out for six. Then he said, in the presence of Judge Doyle and Mr. Thomas F. Burke, that he and Mr. Plunkert were told that they would not pay any more than five per cent, and said Judge Doyle told him and Plunkert in the presence of Mr. Burke that the trustees were not willing to pay any legal fees to the attorneys; that somebody had to pay them or there would not be any contract.

I asked him who asked for the ten thousand.

I said, "Who first mentioned that sum?"

And he said, "Judge Doyle did."

So he said he was quite put out and miffed about the whole thing. He said he had done all the work and had the deal pretty well shaped up, and Morris Pollin had called him up at the last minute and told him that he had to put Plunkert in the picture whether he liked it or not, and give him half of his commission.

And Mensh said Plunkert had not done any work; he had done all the work.

And he said Morris Pollin and Dan Pollin told him Plunkert controlled some land in the vicinity of the Kolipinski tract; that he, Pollin, needed to straighten out some property lines, and there was mention of some old
268 rights of way over part of the property.

Pollin said he had to deal with him and consequently Mensh had to deal with him, and to give him half of his commission whether he liked it or not.

He said that is how Plunkert got in it.

He said when Judge Doyle asked for ten thousand out of the commission, he said it was leaving him practically nothing.

He said the lawyer is going to get ten, and then the remaining eighteen thousand-odd dollars, half of it had to go to Plunkert, and he said he went outside Judge Doyle's office and called up Morris and Dan Pollin and told both of them that he couldn't get a contract on this property without giving the lawyers \$10,000, and he said he told both of them he still wanted six per cent commission for himself.

He said Morris and Dan Pollin told him to go ahead and give the lawyers the ten thousand; that they would reimburse Mensh for it and pay him that one per cent additional commission himself.

Then he said after the Pollins got the deed and it was recorded, he said they didn't do anything about paying him, and he said he went over and consulted Mr. H. Max Ammerman. He asked me whether I knew Mr. Ammer-

man, and at that time the name was familiar, but I couldn't recall Mr. Ammerman at all.

He said he consulted him about suing the Pollins.
 269 And he said Ammerman could not handle it, because he was in the office with Mr. Ottenberg, who represented the Pollins, but that Mr. Ammerman was trying to find a lawyer for him.

* * * *

270 He told me that Pollin had given him a grand turning around; that he spent a lot of time on this deal and had gotten practically nothing for it.

He said that Morris and Dan Pollin had told him to forget about this idea of suing them; that he would give them the exclusive sale on the first hundred houses they had built on this Kolipinski property, and Mensh asked me what I thought about it, whether he ought to still try to go ahead and collect the money. And I told him I didn't see how it would be made any worse, whether he tried to collect it or not, as far as I was concerned.

And the last thing he said to me, as I walked out his front door, he said—he followed me to the front
 271 door, and he said, "Well, maybe I would make more money trying to do business than waste a lot of time in a lawsuit with these people, and I might make more out of them by continuing to do business with them."

* * * *

336

Charles M. Plunkert

was called as a witness for and on behalf of the plaintiffs and, having been previously duly sworn, was examined and testified as follows:

Direct Examination

* * * *

357 Q Before it was signed, rather.

And did you meet in Judge Doyle's office? A Yes, sir.

Q Who was there at the time? A Judge Doyle, Mr. Burke, Mr. Mensh, and myself.

Q Will you give us all the conversation that took place, and what anybody present said on that occasion? A Well, what we was trying to do was to get 10 per cent commission on the sale of the property. Judge Doyle and Mr. Burke said that the trustees would not pay 10 per cent. So we agreed to accept 6; that is, that was placed in the contract, 6 per cent.

Q Well, the contract in evidence, Mr. Plunkert, calls for 5 per cent commission. I don't quite understand. You just said that the contract called for 6. A The offer, as we had made it, had 6 per cent in the margin
358 where it says "The broker is to receive a 6 per cent commission."

Q Have you told us all of the conversation on that occasion in Judge Doyle's office? A Well, we said that the attorney fees would have to be paid out of the commission.

Q Tell us word for word, as near as you can recollect, everything which was said about that subject. A Well, they wanted to save the estate the attorneys' fees, so therefore it was required of the brokers to pay the attorneys' fees.

Q Tell us what was said about it. I don't want your conclusion. I want the words, as nearly as you can give it to us, and who was doing the talking at the time. A Well, Judge Doyle and Mr. Burke. Of course we were talking back and forwards, discussing the commission.

Q What was said, Mr. Plunkert? A Well, as near as I can remember, I have told you what was said.

Q Well, who first mentioned the subject of 10,000? A Judge Doyle.

Q And did Judge Doyle say on that occasion that the trustees of the Kolipinski—

THE COURT: No. Suppose you tell us as near as you can remember, in Judge Doyle's own words, what he said.

359 THE WITNESS: Judge Doyle said that the fees for the attorneys would have to come out of the sale of the property; that the estate wanted to save the attorney fees in this case; that they had did a lot of work on it, which I knew they had.

BY MR. SMITH:

Q Is that all of it? A That is all.

THE COURT: Was the amount of the attorneys' fees mentioned?

THE WITNESS: It was, sir; yes, sir. \$10,000.

BY MR. SMITH:

Q Mr. Burke was there when that was mentioned? A Yes, sir.

Q Did Judge Doyle tell you that the Kolipinski trustees were not willing to pay any lawyers' fees in connection with the sale? A That is right.

Q And did Judge Doyle tell you that you would be required to put in writing a payment of \$10,000 out of the brokers' commission? A We did.

* * * *

363 BY MR. SMITH:

Q Did you know anything about an agreement that Mensh had to be reimbursed for the \$10,000 and to get 1 percent additional commission from Morris and Dan Pollin?

MR. OTTENBERG: If your Honor please, there is no such testimony in this case. I object.

THE COURT: Objection sustained.

BY MR. SMITH:

Q Did you have any knowledge about an agreement to reimburse the brokers for the \$10,000 that was paid to the lawyers?

MR. OTTENBERG: It is the same question in a little different form.

THE COURT: Objection overruled.

The previous question was not proper in form, because it assumed the fact to exist. This question has cured that defect.

THE WITNESS: What is your question?

THE COURT: Read the question, Mr. Reporter.

(The pending question, as above recorded, was read by the reporter.)

MR. OTTENBERG: There is no testimony in this case—

364 THE COURT: I do not like to have statements and argument made in open court in the hearing of the jury.

MR. OTTENBERG: Excuse me. I object.

THE COURT: Objection overruled.

THE WITNESS: No.

BY MR. SMITH:

Q You never at any time heard anything about any such agreement; is that right? A No, sir.

* * * *

365 Q Do you remember when Judge Doyle asked for the \$10,000 and Mensh balked about it? A Well, both of us had a conference.

Q Well, tell us what was said in that conference. A Well, Mensh wanted to know if I would agree, and I said yes. So he agreed.

366 Q Well, was Mensh sore about the whole thing? A If he was sore, he didn't express it to me.

Q Well, would you say he was happy about it? A No.

Q And you were not either, because it was cutting your commission way down, too, wasn't it? A That is right.

Q And you knew you couldn't get any contract unless you agreed to give the lawyers \$10,000, didn't you? A We knew that the attorney fees had to be paid.

Q Well, you knew you couldn't get a contract without giving these lawyers \$10,000; isn't that correct?

THE COURT: The Court has heard no testimony about giving ten thousand.

MR. SMITH: Well, I mean paying it, your Honor.

THE WITNESS: Well, the only thing that I know is that the attorney fees had to be paid out of the commission.

BY MR. SMITH:

Q Or otherwise you would not get any contract? A There was nothing said that we would not have a contract.

Q Well, Mr. Plunkert, wasn't that implicit in the situation?

THE COURT: Well, I think the jury can draw its own inferences.

367 I will exclude that question. That is a matter of argument.

